92-152

Supreme Court, U.S.
MAR 17 1993

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CRAIG FEINSTEIN,

Petitioner,

v.

CITY OF LOS ANGELES,
a Municipal Corporation;
DARYL F. GATES,
Chief of Police

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL FOR THE
STATE OF CALIFORNIA

WALTER H. ROOT,
Attorney for Petitioner,

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Twelfth Floor
Orange, California 92668
(714) 558-9119

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QUESTIONS PRESENTED FOR REVIEW

1. Whether due process of law required by the Fourteenth Amendment to the United States Constitution requires that a public employee with a vested property interest in his job be allowed the opportunity to pursue a post-termination appeal.

2. Whether an administrative "appeal authority" may, consistent with due process of law required by the Fourteenth Amendment to the United States Constitution, transmute punishment meted out to the public employee from a minor suspension to a termination.

3. Whether due process of law required by the Fourteenth Amendment to the United States Constitution requires that punishment be fixed before the public employee is forced to exercise his right of appeal.

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The unpublished decision of Division II in the Second District Court of Appeal for the State of California is appended hereto as Appendix A. The denial of FEINSTEIN's petition for rehearing in the same court is appended hereto as Appendix C. The denial of FEINSTEIN's petition for review by the Supreme Court of the State of California is found in Appendix E.

JURISDICTION

The order sought to be reviewed was made and entered on September 30, 1992. The order denying FEINSTEIN's timely motion for rehearing was made and entered on October 16, 1992. The order denying FEINSTEIN's petition for review to the

Supreme Court of the State of California was made and entered on December 17, 1992. The statutory provision believed to confer jurisdiction on this court to review the judgment in question is 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution, § 1, Clause 2:
". . . nor shall any State deprive any person of . . . property without due process of law. . . ."

STATUTES AND ORDINANCES

CAL. GOV'T CODE §3300-3311 (Deering 1982 & Supp. 1992), attached hereto as Appendix H.

LOS ANGELES, CA., CITY CHARTER art. XIX, §202(2), attached hereto as Appendix I.

STATEMENT OF THE CASE

FEINSTEIN, a "public safety officer" with a vested property interest in his job pursuant to the "Public Safety Officers' Procedural Bill of Rights Act" (CAL. GOV'T CODE §§ 3300-3311 (Deering 1982 & Supp. 1992), hereinafter "Bill of Rights Act"), had been employed by the CITY OF LOS ANGELES in that capacity for a period of approximately nine years, when, on February 8, 1990, he was accused in a personnel complaint of committing "several traffic violations" while off duty. (CT. 3, 23, 133)

Disciplinary actions against L.A.P.D. officers are governed by the Los Angeles City Charter. Under Article XIX, § 202(2), the Chief of Police must convene a "Board of Rights" (hereinafter "Board") in order to impose punishment in excess of a 30-day suspension, with reprimand. Lesser punishments may be imposed unilaterally, subject to the officer's right of appeal to a Board. (CT. 32, 34-35)

The Chief of Police followed the recommendation of FEINSTEIN's commanding officer that he impose a 10-day suspension and FEINSTEIN appealed, thus causing a Board to be convened.[1] (CT. 3, 5, 133)

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[1] If FEINSTEIN had not appealed, his punishment could not have been increased. Hopson v. City of Los Angeles, 139 Cal.App.3d 347, 352, 188 Cal.Rptr. 689, 692 (1983).

On November 20, 1990, at the conclusion of the Board hearing, the Board announced its decision to recommend that FEINSTEIN be removed from his position as a police officer. (CT. 547) The recommendation was approved by the Chief of Police, and FEINSTEIN's employment was officially terminated on December 11, 1990. (CT. 43)

Because FEINSTEIN had no prior notice that the City was seeking his removal, he produced no evidence of mitigating circumstances, nor did he produce character witnesses during the penalty phase of the Board hearing. (CT. 13, 528) He had no opportunity to pursue an administrative appeal from the decision to terminate his employment.

On November 14, 1991, FEINSTEIN filed a petition for peremptory writ of mandate in the trial court seeking to overturn the removal decision on the basis that, among other things, his due process rights were violated by the Board's decision to increase his punishment from a 10-day suspension to a termination. (CT. 103, 108-120)

The trial court held that FEINSTEIN's contention in this regard was "seriously vitiated by Holcomb v. City of Los Angeles (1989) 210 Cal.App.3d 1560" and that his argument that Holcomb was wrongly decided "misconceives of the power of an inferior court with respect to the decisions of appellate courts." (CT. 163-164)

The petition was denied, and judgment was entered against FEINSTEIN on December 19, 1991. (CT. 169-170)

FEINSTEIN appealed to the Second District Court of Appeal for the State of California. In his appeal, he asserted that he was denied due process by the failure to notify him of the "proposed action" (i.e., termination) prior to the Board hearing and the failure to provide him with a post-termination hearing. (Appendix F, pages 13-15; Appendix G, pages 9-27) The court affirmed the trial court's judgment, relying upon its prior decision in Holcomb as support for the proposition that FEINSTEIN had "sufficient notice of the possibility of greater punishment" (emphasis added). (Appendix A, page 12) Although the court defined one of the issues presented by FEINSTEIN's appeal as whether he was "provided with any meaningful avenue of administrative appeal after the removal decision was made" (Appendix A, pages

8-9), its decision completely failed to address that issue. (Appendix A)

FEINSTEIN filed a petition for rehearing in the appellate court, pointing out its failure to address his claim that constitutional guarantees of due process require a post-termination hearing. (Appendix B, page 4) His petition for rehearing also took exception with the court's characterization of the Los Angeles City Charter as providing notice of the "possibility" of removal to an officer who "opts" for a Board of Rights hearing after action is taken to impose a minor suspension. (Appendix B, page 4)

The petition for rehearing was denied without comment by order dated October 16, 1992. (Appendix C)

FEINSTEIN then petitioned for review to the Supreme Court of the State of California, limiting the issues presented for review to the constitutional due process issues raised herein. (Appendix D)

The petition for review was denied without comment on December 17, 1992. (Appendix E)

DUE PROCESS IS DENIED WHEN TERMINATION IS IMPOSED AT THE LAST STAGE OF APPEAL FROM A LESSER PUNISHMENT

Public agencies should not be allowed to circumvent post-termination due process procedures by imposing the penalty of termination at the last stage of appeal from a lesser punishment. When a public agency's appeal authority is empowered to increase the recommended

punishment, the undesirable consequences include:

1. Public agencies are given free rein to retaliate against employees who exercise their right of appeal;

2. Employees are deprived of the ability to intelligently exercise their right of appeal, because without a fixed punishment it is impossible to know what is being appealed from;

3. Employees appealing from a reprimand or minor suspension must produce character witnesses whose participation would otherwise be unnecessary; and

4. Employees must risk termination in order to appeal from a reprimand or minor suspension.

In a fairly recent line of cases, public agencies have sought to take advantage of statutes authorizing the

administrative appeal authority to "modify" punishments (e.g., Andersen v. Civil Serv. Comm'n, 122 Cal.App.3d 577, 579, 176 Cal.Rptr. 66, 67 (1981)) or which are merely silent as to the appeal authority's scope of power[2] (e.g., Holcomb v. City of Los Angeles, 210 Cal.App.3d 1560, 259 Cal.Rptr. 1 (1989)) to effectuate a harsher punishment from which the employee cannot appeal because the harsher punishment is imposed, for the first time, at the final stage of an appeal from a lesser punishment.

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[2] In this case, the governing ordinance (LOS ANGELES, CA., CITY CHARTER, art. XIX, § 202(2)) simply states that a Board of Rights may impose certain punishments, up to and including termination, but does not specify whether termination may be imposed upon appeal from a lesser punishment. The City Charter calls for the Board to act as the initial disciplinary authority in some instances, and as the appeal authority in other instances.

FEINSTEIN's case is apparently the first, nationwide, wherein this insidious procedure has been successfully applied to effectuate termination. In a case strikingly similar to FEINSTEIN's, but decided after FEINSTEIN's petition for review to the California Supreme Court was denied, another appellate court distinguished termination from lesser forms of discipline and endorsed the arguments urged in this petition:

> The present case differs in that the commission here did not simply increase the duration of Paoli's suspension but imposed the entirely different penalty of termination. Termination is the most extreme penalty that can be imposed in the employment context, depriving

the employee of the means of livelihood and making it more difficult to find other employment because of the questionable circumstances under which the prior job ended. (See, Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532, 543 [84 L.Ed.2d 494, 504-505, 105 S.Ct. 1487].) By contrast, a suspension does not destroy but merely interrupts employment. (Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552, 562 [150 Cal.Rptr. 129, 586 P.2d 162].) The change from an order imposing a 30-day suspension to an order terminating employment does not simply change an

incidental detail but alters the fundamental nature and effect of the originally imposed punishment. Neither Andersen nor recognized definitions allow a change of this kind to be viewed as a 'modification.'

Indeed, to view the commission's authority to 'modify' disciplinary orders as allowing it to change an order of suspension to one of termination would violate employees' right to due process. Due process requires that before punitive action is taken an employee must be given notice of the proposed disciplinary action and an

opportunity to respond. (Skelly v. State Personnel Bd., supra, 15 Cal.3d 194, 215; Cleveland Board of Education v. Loudermill, supra, 470 U.S. at p.546 [84 L.Ed.2d at p.506].) In the present case, Paoli was given notice of and an opportunity to respond to the proposed 30-day suspension; he was never informed that he faced outright termination of his employment. While the ordinance authorizing the commission to 'modify' a disciplinary order may be viewed as providing notice that an initial order might be altered in a manner unfavorable

> to the employee (Andersen, supra, 122 Cal.App.3d at p.580), it cannot be seen as giving the employee notice that a manner of punishment totally different from that imposed by the appointing authority might be imposed after an appeal to the commission. Accordingly, the commission exceeded its authority under the Mendocino County Civil Service Ordinance by changing the appointing authority's order of suspension to an order of termination.

Paoli v. Civil Serv. Comm'n, 12 Cal.App.4th 1073, 1077-78, 15 Cal.Rptr.2d 874, 876-77 (1993).

Most decisions take for granted that a post-termination evidentiary hearing is needed to satisfy constitutional due

process requirements. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Coleman v. Dep't of Personnel Admin., 52 Cal.3d 1102, 1119, 805 P.2d 300, 309, 278 Cal.Rptr. 346, 355 (1991); Skelly v. State Personnel Bd., 15 Cal.3d 194, 205, 539 P.2d 774, 782, 124 Cal.Rptr. 14, 22 (1975).

Indeed, one California decision interprets the statute giving FEINSTEIN a vested property interest in his job, the Bill of Rights Act (more specifically, CAL. GOV'T. CODE § 3304(b) (Deering 1982)), as requiring a post-termination hearing. Doyle v. City of Chino, 117 Cal.App.3d 673, 679-80, 172 Cal.Rptr. 844, 847 (1981).

Even when an employee admits facts which allegedly constitute "just cause" for termination, a formal post-termination evidentiary hearing must be

provided so that the employee may contest the severity of the punishment. Kelly v. Smith, 764 F.2d 1412, 1415 (11th Cir. 1985); Crain v. Bd. of Police Comm'rs, 920 F.2d 1402, 1414-15 (8th Cir. 1990) (Gibson, J., dissenting).

FEINSTEIN's case is not the first, nor will it be the last, in which an administrative appeal authority's power to increase the punishment meted out to an employee is called into question. At the very least, the power to transmute a punishment appealed from into an entirely different class of punishment[3] raises fundamental due process concerns. It may safely be assumed that numerous public

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[3] It is well recognized that termination is so profoundly different from other forms of punishment or discipline that additional due process safeguards are required. (See excerpt from Paoli, quoted at page 12-16 of this brief.)

agencies have vested their administrative appeal authorities with the power to "modify" the punishment imposed in the initial disciplinary action (see, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 537, fn.1), or have authorized them to impose a wide range of punishments without stating whether the initial punishment may be increased, (as in FEINSTEIN's case).

FEINSTEIN's case is a compelling example of how the constitutional right of due process can be obfuscated by bureaucratic bungling and myopic, pro forma judicial review. The opportunity to correct a grave injustice and fill the vacuum of Supreme Court precedent concerning post-termination due process should be seized.

CONCLUSION

This court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

Dated: 3/16/93

By: Walter H. Root
WALTER H. ROOT
Attorney for Petitioner,
CRAIG FEINSTEIN

92-1531

No. (2)

Supreme Court, U.S.
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APPENDIX A

DECISION, COURT OF APPEAL
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT,
DIVISION TWO

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CRAIG FEINSTEIN, Petitioner and Appellant,	)	B064844 (Superior Court No. BS005615)
v.	)	
CITY OF LOS ANGELES, et al.,	)	
Defendants and Respondents.	)	

Appeal from a judgment of the Superior Court of Los Angeles County. Ronald M. Sohigian, Judge. Affirmed.

Hollins, Schechter & Feinstein and Walter H. Root for Petitioner and Appellant.

James K. Hahn, Los Angeles City Attorney, Frederick N. Merkin, Senior Assistant City Attorney, and Diane N. Wentworth, Assistant City Attorney, for Defendants and Respondents.

Appellant Craig Feinstein appeals from a judgment entered after the trial court denied his petition for peremptory writ of mandate. We affirm.

FACTS

On February 8, 1990, a personnel complaint was lodged against Feinstein who had been employed by the City of Los Angeles as a police officer for nine years. The complaint charged that "[t]he department alleges that Officer Feinstein, while off-duty, drove his vehicle on a highway willfully and unnecessarily committing several traffic

violations." The complaint contained a detailed description of the charges to the effect that appellant, while in civilian clothing and driving his own vehicle had been observed by an off-duty station officer and a former station officer weaving through traffic, travelling at an excessive rate of speed, and proceeding through three red lights.

Feinstein's commanding officer reviewed the results of an investigation of the complaint and prepared a letter of transmittal, recommending that the charge be sustained and that Feinstein be suspended for ten working days. The letter of transmittal stated that Feinstein said he could not recall having committed any traffic violations or what route he travelled to the station that day. Furthermore, the letter of transmittal gave detailed background as

to why Feinstein's conduct was of serious concern. It stated: "Firstly, his driving was totally unreasonable, and he subjected himself and other citizens to unnecessary hazards. Secondly, although he was in his own vehicle and did not easily reflect badly on the Department, he was recognized by a civilian employee and a former civilian employee. In that way, he brought discredit to all Los Angeles Police Officers. Thirdly, is his disrespect for the law." The letter detailed Feinstein's "strong propensity to over-drive" and related that his driving skills and attitude have been challenged three times by the department; his own peer group had twice made formal complaints about him and refused to work with him because of his poor driving habits; he had three sustained counts of misconduct for operating a city vehicle

in an unsafe manner and for driving unauthorized code-3 (lights and siren); he was restricted from driving departmental vehicles and assigned to desk duties.

Before the recommendation for suspension was acted upon, Feinstein was provided with a copy of the investigation report, the complaint and letter of transmittal, and was given an opportunity to submit a response. Feinstein requested additional information and documentation. His request that his accident history while operating a black and white vehicle be removed was denied on the basis that Feinstein's overall pattern of driving was at issue, and that his driving record was appropriate to give the reviewer a clearer picture of his performance.

On April 19, 1990, then Chief of Police Darryl Gates imposed a ten-day suspension as recommended. Feinstein subsequently appealed from the order of suspension by submitting an application for hearing before and decision by board of rights.

The board of rights commenced its hearing on November 5, 1990. At the conclusion of evidence, the board found Feinstein guilty of the charge in that he violated Vehicle Code section 21658 (unsafe lane change), Vehicle Code section 21453, subdivision (a) (running a red light), and Vehicle Code section 22350 (excessive speeding). During the penalty phase of the hearing, the board members were provided with Feinstein's personnel records. Feinstein did not produce character witnesses, as was his right. The board then recommended that

Feinstein be removed from his position as police officer II. The recommendation was approved by Chief Gates, and Feinstein was terminated on December 11, 1990.

Feinstein's request to convene another board of rights hearing to allow him to present character evidence was denied. Feinstein filed an amended verified petition for peremptory writ of mandate, seeking to set aside the removal decision and restore Feinstein to his position, which was denied. This appeal follows.

ISSUES

Feinstein contends that (1) he was removed from his position without proper notice as required under due process; and (2) he was not provided with any meaningful avenue of administrative

appeal after the removal decision was made.

DISCUSSION

I. Standard of Review

Where the decision of an administrative agency substantially affects vested, fundamental rights, the trial court examines the administrative records for errors of law and exercises its independent judgment upon the evidence disclosed. (Bixby v. Pierno (1971) 4 Cal.3d 130, 143.) On appeal, the appellate court "need only review the record to determine whether the trial court's findings are supported by substantial evidence." (Id. at p. 143, fn. 10.)

II. Appellant Was Properly Provided with Due Process Rights

Appellant contends that his due process rights were violated because he was not provided with sufficient notice of the increased penalty of removal, there was no new evidence supporting the increased penalty, the board based the increased penalty on a mistaken impression that the department would be subject to liability for Feinstein's off-duty driving, and the charge contained in the personnel complaint was vague. We disagree with all of appellant's contentions.

Our Supreme Court has held that notice, a copy of the charges and materials upon which the action is based, and the right to respond must be provided when a civil service employee's protected interest may be infringed. (Skelly v.

State Personnel Bd. (1975) 15 Cal.3d 194, 215.) Section 202 of the Los Angeles City Charter governs the discipline of police officer. Paragraph (2)(b) gives the accused the option to a hearing before the board of rights upon the imposition of a suspension. Paragraph 12 provides that if he board of rights finds appellant guilty of the charges, he may be subject to suspension not exceeding six months (with or without reprimand); or reprimand without further penalty; or removal from his office or position.

Clearly, appellant was given notice of the possibility of an increased penalty, as is supported by this division's decision in Holcomb v. City of Los Angeles (1989) 210 Cal.App.3d 1560.[1] In Holcomb, a police officer was suspended for five days after a personnel complaint was filed against him alleging

insubordination. After an adversarial hearing, which the officer requested, the board of rights found that Holcomb was guilty of the charge, and during the penalty phase, recommended that the suspension be increased to a period of 15 days. We concluded that because the "city charter explicitly empowers the Board of Rights to recommend a more serious punishment than that originally imposed," Holcomb had sufficient notice of the possibility of greater punishment. (Id. at p. 1566.) While appellant argues that appellant was entitled to "more due process" because the penalty of removal is so much more severe, he does not spell out what that entails. Rather, with the benefit of hindsight, he now complains that he is entitled to a second evidentiary hearing with a newly constituted board at which he must be

given the opportunity to contest the penalty. We do not agree.

First, we do not see how appellant could have been given "more" notice. Skelly specifically outlined pre-removal safeguards as notice, reasons, a copy of the charges, and the right to respond. (Skelly v. State Personnel Bd., supra, 15 Cal.3d 194, 215; see also Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552,559.) Second, appellant had a full and fair opportunity to present witnesses at the board of rights hearing, which he refused. We view appellant's argument as mere subterfuge to request a new hearing in order to belatedly present witnesses on his behalf.

Next, we reject appellant's contention that an increased penalty must be based on new evidence. Appellant

attempts to distinguish the increased penalty in Holcomb by arguing that in that case, the board of rights relied on new evidence which was not considered in the initial internal investigation leading to the original five-day suspension. However, the new evidence in Holcomb was a tape recording of a meeting between Holcomb and his supervising officer, made by Holcomb which he had not made available prior to the board of rights hearing. We merely determined that the tape recording was evidence relied upon by the board to make its finding of guilt, and that there was no evidence that Holcomb was penalized for his appeal. We stated in Holcomb that "[t]he Board hearing is a de novo adversarial proceeding at which no reference is made to the evidence adduced in the course of the prior internal

investigation. The Board's decision is based solely upon the evidence presented to it." (Holcomb v. City of Los Angeles, supra, 210 Cal.App.3d 1560, 1565.)

Appellant's argument that the board of rights removed appellant from his position because it relied on the erroneous concept that the police department would be subject to civil liability if appellant were involved in a traffic accident on his way to work is not well taken. Appellant's background was considered in detail by the board of rights in assessing the penalty. This background included: appellant had been suspended for a total of 39 days during his time on the police force for disciplinary reasons; he had been involved in three preventable traffic accidents while on duty; he had been given desk duty for a year and a half and

removed from patrol duty; his peers asked not to be assigned to work with him because of his driving record; he was unresponsive to prior discipline; he was uncooperative with his peers and supervisors; and he denied any knowledge of the traffic violations with which he was charged. In making its determination, the board of rights stated that it relied on its past knowledge and experience in similar disciplinary issues, appellant's past disciplinary history, his failure to respond to progressive discipline, and the potential liability to the department. Clearly, although the board of rights was concerned about the city's potential exposure, should appellant become involved in a traffic accident on the way to work, the board considered the entirety of appellant's history of unsafe driving, most of which was performed

while on duty. It was not mistaken in considering the extent to which appellant's conduct was likely to result in harm to the public service. (Skelly v. State Personnel Bd., supra, 15 Cal.3d 194, 218.)

Appellant next asserts that the complaint was vague because it charged that "while off duty [appellant] drove his vehicle on a highway willfully and unnecessarily committing several traffic violations," yet he was found guilty of violating specific Vehicle Code sections, to wit, section 21658 (unsafe lane change), section 21453, subdivision (a) (running a red light), and section 22350 (excessive speeding).

Administrative proceedings are not bound by the strict rules of pleading. (Stearns v. Fair Employment Practice Com. (1971) 6 Cal.3d 205, 213.) As long as

appellant has been informed of "the substance of the charge and afforded the basic, appropriate elements of procedural due process, he cannot complain of a variance between administrative pleadings and proof." (Ibid.) We find appellant's argument to be without merit because on the first page of the complaint, a detailed summary of the charges appears, giving appellant ample means to respond.[2]

We conclude that substantial evidence existed to support the trial court's ruling.

III. Appellant Was Properly Provided An Administrative Appeal

Appellant contends that the board of rights proceeding did not constitute an administrative appeal. The contention is meritless.

We reject Feinstein's reasoning that the board of rights hearing cannot be both a de novo hearing and an administrative appeal, and that the request for the board hearing is tantamount to exposure to double jeopardy. Government Code section 3304, subdivision (b) states that no punitive action may be taken against an officer without providing the officer with an opportunity for administrative appeal. As this division held in Holcomb, the initial suspension is a punitive action, and since the only process to challenge the discipline is to request a hearing before the board of rights, that hearing constitutes the required administrative appeal. (Holcomb v. City of Los Angeles supra, 210 Cal.App.3d 1560, 1567; Crupi v. City of Los Angeles (1990) 219 Cal.App.3d 1111, 1120.)

In the light of the above disposition, appellant's request for attorney fees under a private attorney general theory is rejected, as is his request for back pay.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

_____, J.
NOTT

We concur:

_____, acting P.J.
FUKUTO

_____, J.*
SUZUKAWA

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*Assigned by the Chairperson of the Judicial Council.

FOOTNOTES:

1. At oral argument, appellant argued that the city charter itself states that an increased penalty can be assessed only if the chief of police requests the board of rights hearing. Nowhere do we find anything in the charter that supports this contention.

2. The "summary of complaint" reads: "On February 6, 1990, at approximately 2150 hours, witness Loper (off-duty Station Officer assigned to Southwest Area Jail) and witness Barrow were traveling Eastbound [on] Rodeo Rd. approaching La Cienega Ave. in witness Loper's vehicle. Witness Barrow was a passenger. As [witnesses] were stopped for a tri-light signal at La Cienega Ave., witness Loper observed and recognized Officer Feinstein driving what appeared to be his personal vehicle. [¶] Feinstein was attired in civilian clothing. As the tri-light signal turned green, [witnesses] observed Feinstein rapidly accelerate his vehicle through the intersection and weave through traffic in lanes #1 & #2 on Rodeo Rd. [¶] Feinstein stopped his vehicle at La Brea Ave. for a red tri-light signal. As [witnesses] approached La Brea Ave., they observed Feinstein drive his vehicle through a mid-phased red tri-light signal. [Witnesses] observed no cross traffic at the time of the violation, [witnesses] continued to follow Feinstein and observed him merge Eastbound onto Martin Luther King Blvd. and weave through traffic until he was forced to stop for a red-tri light signal at

Coliseum Ave. As [witnesses] approached Coliseum Ave., they observed Feinstein drive his vehicle through a mid-phased red tri-light signal. [Witnesses] observed no cross traffic at the time of the violation. [Witnesses] continued to follow Feinstein's vehicle and observed him make a right turn onto Marlton Ave. [Witnesses] next observed Feinstein's vehicle Eastbound on Martin Luther King Blvd. at Crenshaw Blvd. stopped for a red tri-light signal. [Witnesses] stopped for the red tri-light signal at Crenshaw Blvd. adjacent to Feinstein's vehicle. They observed Feinstein drive his vehicle through a mid-phase red tri-light signal. [Witnesses] observed no cross traffic at the time of the violation. [Witnesses] last observed Feinstein's vehicle in the area of 5th Ave. Due to Feinstein's vehicle traveling at a high rate of speed, witness Loper decided not to exceed the speed limit to follow Feinstein."

APPENDIX B

PETITION FOR REHEARING

2nd Civil No. B 064844

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA
DIVISION TWO

CRAIG FEINSTEIN, Appellant, v. CITY OF LOS ANGELES, a Municipal Corporation; DARYL F. GATES, Chief of Police, and DOES 1 through 30, Inclusive, Respondents.	)	CIVIL NO. B064844 SUPERIOR COURT NO. BS005615

APPEAL FROM
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

HONORABLE RONALD M. SOHIGIAN,
JUDGE PRESIDING

PETITION FOR REHEARING

WALTER H. ROOT
HOLLINS, SCHECHTER & FEINSTEIN
505 South Main Street, 12th Fl.
Orange, California 92668
714/558-9119

Attorneys for Appellant,
CRAIG FEINSTEIN

2nd Civil No. B 064844

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA
DIVISION TWO

CRAIG FEINSTEIN, Appellant, v. CITY OF LOS ANGELES, a Municipal Corporation; DARYL F. GATES, Chief of Police, and DOES 1 through 30, Inclusive, Respondents.	)	CIVIL NO. B064844 SUPERIOR COURT NO. BS005615

APPEAL FROM
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

HONORABLE RONALD M. SOHIGIAN,
JUDGE PRESIDING

PETITION FOR REHEARING

INTRODUCTION

Petitioner and appellant CRAIG FEINSTEIN seeks a rehearing on the basis that the court's decision to affirm the judgment is erroneous for the following reasons:

1. The court's opinion completely overlooks the primary basis of FEINSTEIN's appeal, to wit: that Constitutional guarantees of due process require a post-severance hearing; and

2. The court's opinion mischaracterizes the point raised by FEINSTEIN's counsel during oral argument and thus misperceives whether the City Charter put FEINSTEIN on notice of the "possibility" of removal.

CONSTITUTIONAL GUARANTEES OF DUE PROCESS REQUIRE A POST-SEVERANCE HEARING

The court's opinion fails to address FEINSTEIN's claim, supported by unanimous case law, that Constitutional guarantees of due process require a post-severance hearing.[1] Additionally, the opinion fails to distinguish Doyle v. City of Chino (1981) 117 Cal.App.3d 673, quoted extensively at pages 8 through 11 of FEINSTEIN's reply brief, which stands directly for the proposition that Government Code Section 3304(b) requires a post-severance hearing.[2]

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[1] In this respect the court's discussion of the appropriate standard of review is also defective. This issue is one of pure law, subject to independent, "de novo" review. Imperial Irrigation District v. State Water Resources Controls Board (1990) 225 Cal.App.3d 548, 553.

THE COURT'S OPINION INCORRECTLY STATES THAT FEINSTEIN HAD SUFFICIENT NOTICE OF THE POSSIBILITY OF REMOVAL PRIOR TO THE BOARD OF RIGHTS HEARING

During oral argument on September 25, 1992, FEINSTEIN's counsel called the court's attention to the fact that the City Charter does not give notice of the

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[2] The court's charge, at pages 6-7 of its opinion, that FEINSTEIN failed to "spell out" the additional due process required by the increased severity of the penalty imposed against him, is answered in the summary of issues raised by FEINSTEIN at page 4 of the court's opinion; FEINSTEIN has consistently maintained that he was entitled to a post-removal hearing.

"possibility"[3] of removal to an officer who "opts" for a Board of Rights hearing after action is taken to impose a minor suspension.[4]

Nowhere does the City Charter expressly provide that a Board of Rights

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[3] In making this argument, FEINSTEIN by no means wishes to concede the correctness of that portion of the court's opinion which holds that notice of the "possibility" of removal is legally equivalent to notice that the penalty of removal has been decided. The right to appeal cannot be intelligently exercised unless punishment has been fixed.

[4] FEINSTEIN's counsel did not make the argument attributed to him at footnote 1 of the court's opinion. He pointed out that the City Charter can fairly be read to mean that when the Chief of Police does not request a Board, as is his right, he, in effect, limits the potential punishment to a thirty-day suspension, with reprimand, or less. Under this interpretation, the trial court's comment that FEINSTEIN had "gambled and lost" was entirely inappropriate. It was the Chief of Police, not FEINSTEIN, who "made his bed and now must sleep in it" (the exact words used by FEINSTEIN's counsel).

is empowered to impose an increased penalty following an appeal from a minor suspension.

Section 202(2), Article XIX, of the City Charter gives the Chief of Police two disciplinary options: he may impose any punishment, up to and including a thirty-day suspension, with reprimand, or he may convene a Board of Rights to determine the appropriate punishment. The Chief of Police has no authority to unilaterally impose a punishment in excess of a thirty-day suspension, with reprimand. (CT. 32, 34-35)

When a Board of Rights is requested by the Chief of Police, it is presumably for the purpose of imposing a punishment in excess of a thirty-day suspension, with reprimand. When a Board of Rights is requested by an officer, it is for the express purpose of appealing from a

punishment no more severe than a thirty-day suspension, with reprimand.

The City Charter, thus, clearly distinguishes between the role of a Board of Rights requested by the Chief of Police and one requested by a police officer. It may fairly be read to limit the Board's authority in the case of an "opted" Board to the imposition of a penalty no more severe than a thirty-day suspension, with reprimand. Such an interpretation is certainly no more far-fetched than the court's interpretation, which may logically be reduced to the proposition that an officer who appeals from a reprimand must face the risk of removal, without further recourse.

FEINSTEIN submits that it is particularly disingenuous to pretend that the City Charter gives notice of a specific thing to the rank and file of

the Los Angeles Police Department when lawyers can credibly argue that it gives notice of something else.

4.

CONCLUSION

For the foregoing reasons, this petition for rehearing should be granted and the court's opinion should be modified so as to reverse the judgment against FEINSTEIN and award him his attorney's fees and costs, together with back pay retroactive to the date of his termination.

Respectfully submitted,

Dated: October 8, 1992

HOLLINS, SCHECHTER & FEINSTEIN

By:_____
WALTER H. ROOT
Attorneys for Appellant,
CRAIG FEINSTEIN

APPENDIX C

DENIAL OF PETITION FOR REHEARING

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 10/16/92

Hollins, Schechter & Feinstein
Walter H. Root
505 South Main Street
12th Floor, P.O. Box 1027
Orange, CA 92668

RE: Feinstein, Craig
vs.
Los Angeles, City of
2 Civil B064844
Los Angeles No. BS005615

THE COURT

Petition for rehearing denied.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 09/30/92

Hollins, Schechter & Feinstein
Walter H. Root
505 South Main Street
12th Floor, P.O. Box 1027
Orange, CA 92668

RE: Feinstein, Craig
vs.
Los Angeles, City of
2 Civil B064844
Los Angeles No., BS 005615

APPENDIX D

PETITION FOR REVIEW

IN THE SUPREME COURT

IN AND FOR THE STATE OF CALIFORNIA

CRAIG FEINSTEIN, Appellant, v. CITY OF LOS ANGELES, a Municipal Corporation; DARYL F. GATES, Chief of Police, and DOES 1 through 30, inclusive, Respondents.	)	No. _____ Civil No. 064844 Superior Court No. BS005615

APPEAL FROM
THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
HONORABLE RONALD M. SOHIGIAN,
JUDGE PRESIDING

PETITION FOR REVIEW

WALTER H. ROOT
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505 South Main Street, 12th Fl.
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Attorneys for Appellant,
CRAIG FEINSTEIN

IN THE SUPREME COURT

IN AND FOR THE STATE OF CALIFORNIA

CRAIG FEINSTEIN, Appellant, v. CITY OF LOS ANGELES, a Municipal Corporation; DARYL F. GATES, Chief of Police, and DOES 1 through 30, inclusive, Respondents.	)	No. _____ Civil No. 064844 Superior Court No. BS005615

APPEAL FROM
THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
HONORABLE RONALD M. SOHIGIAN,
JUDGE PRESIDING

PETITION FOR REVIEW

1.

ISSUES PRESENTED

1. Do Constitutional guarantees of due process and/or the Public Safety Officers' Procedural Bill of Rights Act (Government Code Sections 3300-3311, hereinafter "Bills of Rights Act,") require that a public safety officer who is discharged for cause be afforded the opportunity to have a post-severance hearing?

2. Do Constitutional guarantees of due process, the Bill of Rights Act and/or the Los Angeles City Charter require that public safety officers be given specific "notice of the proposed action" prior to being forced to exercise their right to an administrative appeal?

STATEMENT OF FACTS

FEINSTEIN, a "public safety officer" within the meaning of the Bill of Rights Act, had been employed by the City of Los Angeles as a peace officer for a period of approximately nine years when, on February 8, 1990, a personnel complaint, alleging that he had committed "several traffic violations" while off-duty, was lodged against him. (CT. 3, 23, 133)

Disciplinary actions against L.A.P.D. officers are governed by the Los Angeles City Charter. Under Article XIX, Section 202(2), the Chief of Police must convene a "Board of Rights" (hereinafter "Board") in order to impose punishment in excess of a thirty-day suspension, with reprimand. Lesser punishments may be imposed unilaterally, subject to the

officer's right of appeal to a Board. (CT. 32, 34-35)

In FEINSTEIN's case, the Chief of Police followed the recommendation of FEINSTEIN's commanding officer to impose a ten-day suspension and FEINSTEIN "appealed," thus causing a Board to be convened. (CT. 3, 5, 133)

On November 20, 1990, at the conclusion of the Board hearing, the Board announced its decision to recommend that FEINSTEIN be removed from his position as a police officer. (CT. 547) The recommendation was approved by the Chief of Police, and FEINSTEIN's employment was officially terminated on December 11, 1990. (CT. 43)

FEINSTEIN had no prior notice that the City was seeking his removal and had no opportunity to pursue an

administrative appeal from the increased punishment.

FEINSTEIN filed a verified Petition for Peremptory Writ of Mandate in the Superior Court on October 28, 1991, contesting the removal decision. (CT. 1-89) The petition was denied, and judgment was entered against FEINSTEIN on December 19, 1991.
(CT. 169-170)

The Court of Appeal affirmed, incorrectly holding that the City Charter gives notice of the "possibility" of removal to an officer "appealing" from a minor suspension, and simply ignoring unanimous case law indicating that a post-severance hearing is guaranteed by the Constitution and Bill of Rights Act. FEINSTEIN's petition for rehearing was denied on October 16, 1992.

FEINSTEIN'S APPEAL RAISES IMPORTANT QUESTIONS OF LAW

FEINSTEIN's appeal is a matter of statewide concern:

> The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers.
>
> Government Code Section 3301

The right of a public safety officer to continued employment, absent good

cause for termination, is a substantial property right protected by Constitutional guarantees of due process. The existence of the substantial property right is created by the Los Angeles City Charter:

> The right of an officer or employee of a police department to hold his office or position and to compensation attached to such office or position is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, . . .

Los Angeles City Charter, Article XIX, Section 202(1).

. . . and is also established by the Bills of Rights Act:

> No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken

> by any public agency without providing the public safety officer with an opportunity for administrative appeal.

Government Code Section 3304(b).

This Court has previously recognized that once a substantial property interest is granted, it is protected by Constitutional guarantees of due process. The majority view in Arnett v. Kennedy (1974) 416 U.S. 134 was adopted in Skelly v. State Personnel Board (1975) 15 Cal.3d 194:

> Where state procedures governing the taking of a property interest are at issue, all six justices were of the view that the existence of the interest is to be determined in the first place under applicable state law, but that the adequacy of

> the procedures is to be measured in the final analysis by applicable Constitutional requirements of due process. [Citations.] 'While the Legislature may elect not to confer a property interest in . . . [civil service] employment [fn. omitted], it may not Constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' Skelly, Id. at 212. (Emphasis added.)

The value of a vested property right is greatly diminished when the procedural safeguard designed to prevent its unjust taking, a so-called administrative "appeal," is actually a de novo proceeding after which the "appellant" is

denied further recourse. It is axiomatic that a public safety officer's right to appeal cannot be intelligently exercised unless or until the punishment sought by the public agency has been fixed.

Certainly, the legislative goal of promoting "stable employer-employee relations" is not served when a public safety officer who appeals from a minor suspension is subject to removal, without further recourse. If a Board may impose a harsher punishment without the benefit of new evidence, as the Court of Appeal's decision holds, then Government Code Section 3304(a), which prohibits retaliation against officers who exercise their right to pursue an administrative appeal, is a dead letter.

Since FEINSTEIN received the "ultimate" punishment of termination, for which the strictest safeguards of

fairness[1] are required, these issues will never be framed in a more compelling way.

4.

REVIEW IS NECESSARY TO SECURE UNIFORMITY OF DECISION

The decision by Division Two of the Second Appellate District in this case merely takes its prior decision in Holcomb v. City of Los Angeles (1989) 210 Cal.App.3d 1560, to its logical extreme, thus amplifying the flawed reasoning in Holcomb. Both decisions are contrary to a substantial body of reported case law and fundamental concepts of due process.

---

1 Fewer procedural safeguards are required for minor suspensions (i.e., suspensions of ten days or less). Civil Service Association v. City and County of San Francisco (1978) 22 Cal.3d 552, 562-563. See also, Howell v. County of San Bernardino (1983)149 Cal.App.3d 200, 206.

A. SPECIFIC "NOTICE OF THE PROPOSED ACTION" IS REQUIRED

As recounted above, FEINSTEIN did not learn of the penalty to be imposed against him until the end of the so-called administrative appeal process. He had no inkling that the City was seeking his removal.

As such, the process through which he was removed from his position runs afoul of this Court's decision in Skelly v. State Personnel Board (1975) 15 Cal.3d 194:

> It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process

> does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these pre-removal safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. Skelly, Id. at 215.

"Notice of the proposed action" requires that punishment be fixed before the accused party is made to elect between accepting the punishment or appealing from it. This concept is so fundamental that it is considered a "given" in scholarly treatises addressing

the subject. See, e.g., Friendly, "Some Kind of Hearing," 123 U. of Pa. L.R. ed. 1267, 1280.

B. A POST-SEVERANCE HEARING IS MANDATORY

Doyle v. City of Chino (1981) 117 Cal.App.3d 673 interprets Government Code Section 3304(b) to require a post-severance hearing. Doyle, Id. at 679-680.

Indeed, it is taken for granted, in every case dealing with the subject, that Constitutional guarantees of due process require a post-severance hearing. See, e.g., Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532, Skelly, Id. at 205; and Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1119.

The Court of Appeal's decision is irreconcilable with Doyle, supra; indeed,

its written opinion contains no attempt to distinguish Doyle on its facts.

5.

CONCLUSION

The Court of Appeal's decision in Holcomb, supra, has produced its first progeny, and the result is not a mere erosion of due process rights guaranteed by the Constitution, but a full-fledged cataclysm. "Son-of-Holcomb" sanctions a vile process that makes a mockery of Constitutional due process and the Bill of Rights Act.

The state legislature's pronouncement in Government Code Section 3301, leaves no room for doubt concerning the importance of the issues raised in this appeal. Unless review is granted, the wayward path chosen by the Court of

Appeal will lead to further confusion, uncertainty and inequity.

Respectfully submitted,

HOLLINS, SCHECHTER & FEINSTEIN

Dated:_____

By:_____
WALTER S. ROOT
Attorneys for Appellant,
CRAIG FEINSTEIN

APPENDIX E

DENIAL OF PETITION FOR REVIEW

Second Appellate District,
Division Two,
No. B064844, S029563

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

CRAIG FEINSTEIN, Appellant

v.

City of Los Angeles, Respondent

Appellant's petition for review DENIED. The request for an order directing publication of the opinion is denied.

_____
Chief Justice

APPENDIX F

APPELLANT'S OPENING BRIEF

2nd Civil No. B 064844

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA
DIVISION TWO

CRAIG FEINSTEIN, Appellant, v. CITY OF LOS ANGELES, a Municipal Corporation; DARYL F. GATES, Chief of Police, and DOES 1 through 30, inclusive, Respondents.	)	Civil No. 064844 Superior Court No. BS005615

APPEAL FROM
THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
HONORABLE RONALD M. SOHIGIAN,
JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

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Attorneys for Appellant,
CRAIG FEINSTEIN

F - 2

2nd Civil No. B 064844

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA
DIVISION TWO

CRAIG FEINSTEIN, Appellant, v. CITY OF LOS ANGELES, a Municipal Corporation; DARYL F. GATES, Chief of Police, and DOES 1 through 30, inclusive, Respondents.	)	Civil No. 064844 Superior Court No. BS005615

APPEAL FROM
THE SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
HONORABLE RONALD M. SOHIGIAN,
JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

F - 3

STATEMENT OF THE CASE.

A. PROCEDURAL HISTORY.

Appellant CRAIG FEINSTEIN had been employed by the City of Los Angeles as a peace officer for a period of approximately nine years when, on February 8, 1990, a personnel complaint was lodged against him. (CT 3, 133) The complaint contained a single charge:

> The Department alleges that Officer Feinstein, while off-duty, drove his vehicle on a highway willfully and unnecessarily committing several traffic violations. (CT 23)

FEINSTEIN's commanding officer reviewed the results of an investigation of the complaint and prepared a Letter of Transmittal, recommending that the charge

be sustained and that FEINSTEIN be suspended for ten working days. (CT 3, 133) The penalty recommendation was based upon FEINSTEIN's "well established pattern of dangerous driving." (CT 26)

Before the recommendation was acted upon, FEINSTEIN was provided with a copy of the investigation report, the complaint and Letter of Transmittal and was given an opportunity to submit a response. (CT 3, 133) His response contained an objection that the charge sustained by his commanding officer was "vague and ambiguous." (CT 28-29)

On April 19, 1990, Chief of Police Darryl Gates imposed a ten-day suspension as recommended. (CT 5, 133) The suspension order recited the single count against FEINSTEIN in somewhat different terms:

On February 6, 1990, at approximately 2150 hours, you, while off duty, operated your personal vehicle in disregard for the public safety and state Vehicle Code. (CT 31)

Shortly thereafter, FEINSTEIN signed an "Application for Hearing Before and Decision by Board of Rights" pursuant to Section 202, Article XIX of the Charter of the City of Los Angeles. (CT 134) The Application states: "Appeal from such order of suspension is hereby made . . . ." (CT 42)

The "Board of Rights" hearing commenced in earnest on November 5, 1990. (CT 189) After two days of hearing evidence and an adjournment of two weeks, the Board announced its decision in the "guilt phase" of the proceeding on November 20, 1990.

(CT 391, 520-521) The Chairman announced that FEINSTEIN had been found guilty of the single count and elaborated that "while there are many, many violations described by Barrow and Loper, the Board established three primary violations which were satisfactorily proven." These violations were described as violations of Vehicle Code Sections 21658 (unsafe lane change), 21453(A) (running a red light), and 22350 (the basic speed law). The locations where these violations occurred were also described. (CT 524-525)

The next phase of the Board of Rights, the "penalty phase," commenced immediately. The board members were provided with FEINSTEIN's personnel records and FEINSTEIN was given the opportunity to produce character witnesses (CT 528), which he declined.

A bizarre colloquy ensued. Each board member singled out criticisms of FEINSTEIN contained within his personnel records and read them aloud. (CT 528-539) Although FEINSTEIN was not on the witness stand and was not under oath, he was, at various points, asked to explain the circumstances underlying a particular criticism. (CT 533-539) Each explanation was followed by verbal derision by the board members of FEINSTEIN's character and past performance. (CT 528-539)

FEINSTEIN's representative, another police officer, was given the opportunity to present his closing argument. He apparently sensed the hostility of the Board's remarks, since his argument consisted solely of stating "for the record" that FEINSTEIN had "opted" for the Board of Rights and that Chief Gates

had previously decided that the appropriate penalty would be a ten-day suspension. The City's advocate vigorously objected to consideration of the prior penalty recommendation and the objections were "noted," but not ruled upon. The Board then went into deliberations. (CT 540-541)

When the Board next reconvened for announcement of the penalty, there was, for the first time, an audience present. (CT 541-542) Before announcing the Board's decision, the Chairman gave its rationale: "The City undoubtedly would have been sued as well as yourself if you had been involved in a traffic accident on your way to work. The liability would be even greater when your past driving and disciplinary record was discovered . . . The Board also noted that no peer or supervisor testified on your behalf."

(CT 543-544; 546) He then announced the Board's decision to recommend that FEINSTEIN be removed from his position as a police officer. (CT 547)

The recommendation was approved by Chief Gates, and FEINSTEIN was officially fired on December 11, 1990. (CT 43)

Pursuant to City Charter Section 202 (16), FEINSTEIN's attorney subsequently presented Chief Gates with a formal, written request to convene another Board of Rights[1] to allow FEINSTEIN the opportunity to present character evidence. (CT 46-49) His attorney pointed out that the penalty of removal was much harsher than penalties imposed upon other police officers for more

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[1] Even the City does not contend that this procedure is equivalent to the appeal envisioned by Government Code Section 3304(b). It is more in the nature of a request for rehearing reconsideration than an appeal. The decision-making authority each step of the process provided for in the City Charter is always the same person -- the Chief of Police.

BEST AVAILA

serious traffic violations, according to the Department's own "Report on Administration of Internal Discipline for the Years 1979 to 1990." (CT 46-87)

FEINSTEIN's request was formally denied by the Acting Chief of Police, Robert L. Vernon, on August 14, 1991. (CT 88)

On October 28, 1991, an Amended Verified Petition for Peremptory Writ of Mandate was filed, seeking to set aside the removal decision and restore FEINSTEIN to his position with all benefits attached thereto. (CT 1-89) The petition was based upon each of the grounds for reversal stated in this appeal, among others. After the matter was briefed, oral argument took place on December 2, 1991 (RT 1-23).

On that date, the Honorable Ronald M. Sohigian, Superior Court Judge, issued

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his Minute Order denying the Petition. (CT 161-165) The Minute Order refers to Holcomb v. City of Los Angeles (1989) 210 Cal.App.3d 1560 and states:

"Petitioner's argument that Holcomb was wrongly decided misconceives of the power of an inferior court with respect to decision of appellate courts. [Citation.] The court finds that the penalty imposed by the Board of Rights was not punishment for Petitioner's attempt to obtain administrative review; . . . " (CT 163-164)

Judgment was entered on December 19, 1991. (CT 169-170) This appeal followed.

B. APPEALABILITY.

FEINSTEIN's petition to the superior court for a peremptory writ of mandate initiated a "special proceeding," and the

judgment thereon was a "final determination of the rights of the parties therein." CCP Sections 1064, 1094.5. Hence, the judgment is appealable. Knoll v. Davidson (1974) 12 Cal.3d 335, 343; Haight v. City of San Diego (1991) 228 Cal.App.3d 413, 416.

C. STANDARD OF REVIEW.

The facts relied upon by FEINSTEIN in this appeal are undisputed. As such, this appeal involves pure issues of law which are subject to independent, "de novo" review. Imperial Irrigation District v. State Water Resources Controls Board (1990) 225 Cal.App.3d 548, 553.

D. SUMMARY OF ISSUES.

The primary issue in this appeal is whether the City of Los Angeles violated

FEINSTEIN's right to administrative due process, as set forth in the Los Angeles City Charter[2] and the Public Safety Officer's Procedural Bill of Rights Act, Government Code Section 3300, et seq., by: (1) removing him from his position without first giving him notice that it was seeking removal; and

(2) failing to provide him with any meaningful avenue of administrative appeal after deciding upon removal.

The primary issue, therefore, is not case-specific. It is an issue which would arise in any case wherein the City imposed a penalty of removal upon an officer who "appealed" from a lesser penalty.

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[2] A corollary of this issue is whether the Los Angeles City Charter itself is flawed and must be revised in light of the Public Safety Officer's Procedural Bill of Rights Act, Governme Code Section 3300, et seq.

In FEINSTEIN's case, however, the denial of due process was aggravated by the fact that he was never informed of a specific charge assigned as cause for his removal, and the fact that there were erroneous legal assumptions made by the Board in its decision to recommend removal.

2.

HOLCOMB V. CITY OF LOS ANGELES DISTINGUISHED

FEINSTEIN's removal, after his "appeal" from a ten-day suspension based upon the same facts, is unprecedented in the annals of reported case law. It was inevitable, after Holcomb v. City of Los Angeles, (1989) 210 Cal.App.3d 1560, was decided, that the City would soon test the limits of its newly-found power to

increase previously imposed penalties at a "Board of Rights" hearing.

In Holcomb v. City of Los Angeles, a police officer "opted" for a Board of Rights hearing after receiving a five-day suspension for insubordination. After a one-day hearing, the Board imposed a fifteen-day suspension. Acting on the officer's petition for a writ of mandate, the superior court vacated the increased penalty. However, the court of appeal reinstated the increased penalty, finding that the Board of Rights hearing was "the required administrative appeal" (Id. at 1567), and that Holcomb had failed to carry his burden of proving that the harsher punishment was retaliation against him for seeking a hearing (Id. at 1568).

It will be argued below that Holcomb was incorrectly decided. Nevertheless,

the lower court's decision in this case must be reversed, even if Holcomb is left entirely intact.

The primary factors which distinguish FEINSTEIN's case from Holcomb are: (1) the nature of the increased penalty imposed by the Board; (2) the lack of new or additional evidence presented at FEINSTEIN's Board; (3) the flawed legal assumptions cited by the Board as the basis for FEINSTEIN's removal; and (4) the vagueness of the charge against FEINSTEIN.

A. MORE DUE PROCESS IS REQUIRED FOR REMOVAL.

The most obvious difference between Holcomb and FEINSTEIN's case is the severity of the penalty imposed by the Board. The increase in penalty imposed by the Board in Holcomb, a mere ten days,

pales in significance to the drastic increase imposed against FEINSTEIN. Such a drastic increase carries with it increased obligations to ensure fairness.

Government Code Section 3304 provides, in pertinent part:

> (a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure. . . .
>
> (b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public

safety officer with an opportunity for administrative appeal. (Emphasis added.)

The "opportunity for administrative appeal" may vary according to the severity of the punitive action taken:

> Section 3304 of the Government Code guarantees only 'an opportunity for administrative appeal.' It does not require the same opportunity regardless of the kind of disciplinary action imposed, . . . Howell v. County of San Bernardino (1983) 149 Cal.App.3d 200, 206.

In Howell, the court held that a government employee who has a "fundamental vested right" to continued employment enjoys no similar right to continuation in a particular job assignment. Id. at 205. In Civil

Service Association v. City and County of San Francisco (1978) 22 Cal.3d 552, the Supreme Court noted a similar distinction between a "minor" suspension and removal:

> In the case of suspensions of the magnitude involved here, it would appear that while the risk of error may be just as great as in a termination case, the consequences are not.
>
> . . .
>
> We note in passing that historically this state has treated suspensions of ten days or less as being somewhat minor with less procedural safeguards involved. [Citations.] We also note that, during the period pending hearing, the employee in the minor suspension case does not face the bleak prospect of

being without a job and the need to seek other employment hindered by the charges against him. Id. at 562-563.

Obviously, the difference between a minor suspension and a termination is profound. Procedures that are sufficient to safeguard the fairness of the former may be (and, in this case, were) wholly inadequate to safeguard the fairness of a termination.

FEINSTEIN is thus entitled to a second evidentiary hearing, with a newly constituted Board, at which he must be given the opportunity to contest the penalty imposed by the prior Board.

B. THE INCREASED PENALTY WAS NOT BASED UPON NEW EVIDENCE.

The lengths to which the Board went in FEINSTEIN's case to align itself with

the Holcomb decision bordered on the ridiculous. In his concluding remarks, the Board Chairman stated:

> We are satisfied that we have a much better view of the entire situation and how it relates to you personally than reviewers of fact had prior to this hearing. (CT 545)

This language mimics, word for word, the language of the Board in the Holcomb case, as quoted in the appellate decision (Id. at 1563.)

However, the shoe does not fit. In Holcomb, the Board found the police officer "guilty" of insubordination after considering, among other things, a tape recording of the conversation in which the alleged insubordination took place. The Board noted that the tape recording had not been reviewed in the initial

internal investigation leading to the five-day suspension. Holcomb, Id. at 1567. The appellate court used this to justify its finding that the Board had not imposed an increased penalty to retaliate against the officer for "opting" for the board hearing:

> The significance of the tape recording is patent. Its contents formed the factual basis of the insubordination charge. By listening to it, the board could not only definitively resolve any disputes about what was said, but it could also draw valid conclusions about Holcomb's attitude by hearing his voice. Furthermore, the Board suggested its penalty after thoroughly reviewing Holcomb's personnel file and engaging in lengthy

> discourse with him, in the course of which Holcomb conceded he had an 'attitude problem.' In sum, nothing in the record even begins to suggest the Board's recommendation of a 15-days' suspension was prompted by Holcomb's exercise of his right to the hearing as opposed to the particular facts of the case. Holcomb, Id. at 1567-1568.

In FEINSTEIN's case, the record discloses no qualitative difference between the evidence obtained during the initial internal investigation and the evidence presented to the Board. FEINSTEIN's commanding officer was well aware of FEINSTEIN's prior disciplinary record, which he referred to in his recommendation for a ten-day suspension, and, unlike Holcomb, FEINSTEIN made no

damaging admissions about deficiencies in his character or attitude to the Board.[3]

To the extent that the availability of new evidence was used by the court in Holcomb to justify its rejection of the lower court's finding that the police officer was subjected to punitive action (the increased penalty) because of the lawful exercise of his right to a board hearing, the lack of new evidence in FEINSTEIN's case justifies a contrary conclusion.

---

[3] FEINSTEIN submits, furthermore, that the practice, at the beginning of the "penalty phase," of having an officer respond to criticisms in his personnel file (with scant mention of the praise, awards, commendations, etc.) while not under oath and without the benefit of having his own copy of the file, is inappropriate. The Board members assume a prosecutorial role not suited to their function. If the officer shows remorse, his remorse is treated as an admission of fault (e.g., Holcomb, Id. at 1567). If he doesn't, he is considered incorrigible (e.g., CT 536-539).

If the officer "opens the door" by voluntarily testifying in order to show rehabilitation, remorse, or mitigating factors, it would, of course, be appropriate for the City's advocate to cross-examine him. That did not happen here, nor, apparently, in

C. ERRONEOUS LEGAL ASSUMPTION.

In FEINSTEIN's case, unlike Holcomb, the Board's recommendation was expressly based upon a mistaken interpretation of law, which FEINSTEIN had no opportunity to correct.

The Board Chairman's lengthy monologue prefacing the announcement of the penalty imposed against FEINSTEIN included the following passage:

> The potential liability to the city was enormous. The city undoubtedly would have been sued as well as yourself if you had been involved in a traffic accident on your way to work. The liability would be even greater when your past driving

---

Holcomb.

and disciplinary record was discovered. (CT 543-544)

No such comment is alluded to in the Holcomb decision. The Board in FEINSTEIN's case suffered from the misapprehension that the City would have been liable for any damages proximately caused by FEINSTEIN's negligence while driving to work. Nothing could be further from the truth. Under the "going and coming rule," an employer is not liable for the negligence of its employees while they are driving to work. Hinojosa v. WCAB (1972) 8 Cal.3d 734.

This erroneous theory was not alleged in the personnel complaint against FEINSTEIN, nor was it argued to the Board. Thus, FEINSTEIN had no opportunity to rebut it at the administrative review level.

D. VAGUENESS OF CHARGE.

In Holcomb, the police officer was found guilty of the charge alleged in the personnel complaint, to wit: "insubordination because of his failure to answer Lieutenant York's inquiries." Id. at 1562.

FEINSTEIN, by comparison, was found guilty of uncharged offenses. The Board found him guilty of violating Vehicle Code Sections 21658 (unsafe lane change), 21453(A) (running a red light), and 22350 (basic speed law), at specific times and at specific places. (CT 339) Although the City Charter requires that a personnel complaint "contain a statement in clear and concise language of all the facts constituting the charge," (CT 35) he had never been charged with these offenses.

The single count against him alleged only "that while off duty [he] drove his vehicle on a highway willfully and unnecessarily committing several traffic violations." (CT 23) It was well within the city's power to delineate the specific offenses prior to the Board of Rights hearing, but it failed to do so. As a consequence, FEINSTEIN had to guess at the true nature of the charges leveled against him, and the Board was free to find him guilty of traffic violations they had not previously contemplated.

HOLCOMB WAS INCORRECTLY DECIDED

A. PUNISHMENT MUST BE FIXED BEFORE ANY MEANINGFUL RIGHT TO APPEAL CAN BE EXERCISED.

One of the most fundamental concepts underlying the right of due process is that "notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it." Friendly, "Some Kind of Hearing", 123 U. of Pa. L.R. ed. 1267, 1280.

Several Supreme Court cases support this proposition:

> . . . we believe that such protection will be adequately provided in circumstances such as these by procedure of the character outlined in Skelly

(i.e., one that will apprise the employee of the proposed action, the reasons therefor . . .)

Civil Service Association v. City and County of San Francisco (1978) 22 Cal.3d 552, 564.

As a minimum, these preremoval safeguards must include notice of the proposed action, . . .

Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 215.

Appellate cases routinely refer to "postseverance" evidentiary hearings available to government employees who are discharged for cause, e.g., Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1119.

Yet FEINSTEIN learned of his removal for the first time, at the end of the so-called administrative appeal process. Not once, prior to announcement of the

penalty, was FEINSTEIN told that the city was seeking his removal. In fact, FEINSTEIN was so unaware of the potential for removal that he declined the opportunity to present character evidence after he was found guilty of the single count. (CT 528)

From a logical standpoint, it can be said that the amount of process due before a person can be deprived of a fundamental vested right is that which is granted in whatever it is that creates the right. FEINSTEIN's right to continued employment is defined in Section 202(1) of the City Charter:

> The right of an officer or employee of the Police Department to hold his office or position and to the compensation attached to such office or position is hereby declared to be a

substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided. No officer or employee of the Police Department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the Police Department (other than by resignation), except for good and sufficient cause shown upon a finding of 'guilty' of the specific charge or charges <u>assigned as cause or causes therefor</u> after a full, fair and impartial hearing before the Board of Rights . . .

(CT 34) (Emphasis added.)

Compounding the fact that the "charge" against FEINSTEIN was ambiguous was the fact that it was not "assigned as cause" for his removal until he had exhausted his right to an administrative "appeal" by challenging the lesser penalty.

If the City Charter is to be read in harmony with Government Code Sections 3300, et seq., it must be construed to require prior notice of the proposed punitive action.

Due process requires provision of a hearing "at a meaningful time," i.e., after termination. Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532, 546-547.

B. A BOARD OF RIGHTS HEARING CANNOT BE A "DE NOVO" PROCEEDING AND AN APPEAL AT THE SAME TIME.

The City must, of necessity, claim that FEINSTEIN's Board of Rights satisfied the requirement of providing an administrative appeal from a punitive action and that it was a "de novo" hearing at which the Board was free to impose any punishment it desired. The City cannot have it both ways.

According to the Holcomb decision, a board hearing "is a de novo adversarial proceeding at which no reference is made to the evidence adduced in the course of the prior internal investigation. The Board's decision is based solely upon the evidence presented to it." Holcomb, Id. at 1565. Yet seven paragraphs later, the Holcomb decision also describes the

hearing as "the required administrative appeal." Holcomb, Id. at 1567.

FEINSTEIN respectfully submits that the words "de novo" and "appeal," used in their legal sense, are mutually exclusive. An appeal lies after, not before, punishment is fixed. The first prerequisite of an appeal is a "final" judgment or order. Efron v. Kalmanovitz (1960) 185 Cal.App.2d 149, 154.

The legislative intent of the Public Safety Officer's Procedural Bill of Rights Act, is declared in Government Code Section 3301:

> The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective

> law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. . . . (Emphasis added.)

Certainly, the stability of employer-employee relations is not enhanced by forcing an employee to face the possibility of forfeiting his career if he challenges a minor disciplinary action, or by facilitating a process through which the employer could, if it so desired, retaliate with impunity against employees who opt for a hearing (see Section "C" below).

Even the City, presumably, would admit that a lack of finality amounting to "double jeopardy" would be a denial of an employee's due process rights. See, e.g., Hopson v. City of Los Angeles

(1983) 139 Cal.App.3d 347, 351-352. Nevertheless, the City disingenuously attempts to circumvent this problem by requiring police officers to request the opportunity to again place themselves in jeopardy in order to obtain review of a disciplinary action.

The FEINSTEIN case, as it so happens, is the most illustrative case imaginable of an administrative appeal process gone astray. Even to the most casual observer, the manner in which FEINSTEIN's case was handled could not help but to destabilize employer/employee relations. Every employee of the Los Angeles Police undoubtedly received the same, unmistakable message when FEINSTEIN's penalty was announced: by opting for a Board of Rights, you are risking your career.

C. AN ILLUSORY OPPORTUNITY TO PROVE RETALIATION DOES NOT SUFFICE IN PLACE OF THE RIGHT TO APPEAL.

The court in Holcomb impliedly admitted that while the Board may suffice as an administrative appeal from the initial suspension (Holcomb, Id. at 1567), something more is required when the Board imposes new or harsher punishment:

> In order to harmonize Government Code Section 3304, subdivision (a) with these procedures, we therefore construe it to mean that the Board may not arbitrarily increase a punishment to retaliate against an officer for seeking a hearing. Holcomb, Id. at 1568.

The court went on to note that it was the officer's burden to overcome the

presumption created by Evidence Code Section 664 that "official duty has been regularly performed."

It goes without saying that stable employer-employee relations are not promoted by requiring an employee to anticipate retaliatory action against him by his employer. One does not "opt" for a Board of Rights with the expectation of receiving harsher punishment.

Nevertheless, the opportunity to "create a record" with which to somehow prove retaliation is forever lost once a Board of Rights has been concluded. There is no right of discovery during the writ process or the appeal process that follows. In fact, inquiry at each level beyond the Board of Rights is limited to the four corners of the record in the lower tribunal. Code of Civil Procedure Section 1094.5(b); 6 Witkin, California

Procedure, Appeal Section 219 (2d ed. 1971); Christensen v. Bocian (1959) 169 Cal.App.2d 223, 226.

Thus, the opportunity to establish retaliation is illusory, at best.

It makes an absolute mockery of Government Code Section 3304 to suggest that an appeal can be had before punishment is fixed or that an employee subjected to an increased penalty after a Board of Rights hearing has a realistic chance of establishing retaliatory motive.

4.

FEINSTEIN IS ENTITLED TO AN AWARD OF BACK PAY AND ATTORNEY'S FEES

Enforcement of the Bill of Rights Act helps to maintain stable relations between peace officers and their

employers, and thus, to ensure effective law enforcement. Therefore, FEINSTEIN's action inures to the benefit of the citizenry of this state. As such, FEINSTEIN is entitled to an award of attorney's fees under a private attorney general theory pursuant to Code of Civil Procedure Section 1021.5. Baggett v. Gates (1982) 32 Cal.3d 128, 142-144; Henneberque v. City of Culver City (1985) 172 Cal.App.3d 837, 845-847.

Similarly, it is error to deny back pay from the time an officer is wrongfully denied an appeal under Government Code Section 3309.5(c). Henneberque, Id. at 842-845.

CONCLUSION

The decision of the Board of Rights in FEINSTEIN's case was fatally flawed in that it was based upon the erroneous legal assumption that the City was liable for FEINSTEIN's negligence, if any, while driving to work. Under the rationale of Holcomb, the fact that FEINSTEIN's removal was retaliation for exercising his right to a Board of Rights hearing is adequately demonstrated by the wide disparity between the punishments deemed appropriate in spite of the lack of any new or additional evidence.

As such, FEINSTEIN is entitled to an order reinstating him in his job and restoring him to status quo as it existed immediately before the Board of Rights hearing. The order should also require

that the records of such hearing and its aftermath, and all references thereto, be expunged from his personnel files.

At a minimum, FEINSTEIN was denied the right to an administrative appeal granted by Government Code Section 3304(b). It is axiomatic that the right to appeal arises after punishment is fixed. FEINSTEIN was entitled to prior notice that the City was seeking his removal and prior notice of the specific charge or charges assigned as cause for removal. If the court adopts this approach, the judgment below must be reversed and remanded for proceedings consistent with FEINSTEIN's right to an administrative appeal from the findings and conclusions of the Board of Rights.

In either case, FEINSTEIN is entitled to an award of back pay retroactive to the date of his

termination and an award of attorney's fees.

Respectfully submitted,

HOLLINS, SCHECHTER & FEINSTEIN

Dated:_____

By:_____
WALTER S. ROOT
Attorneys for Appellant,
CRAIG FEINSTEIN

APPENDIX G

APPELLANT'S REPLY BRIEF

2nd Civil No. B 064844

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA
DIVISION TWO

CRAIG FEINSTEIN, Appellant, v. CITY OF LOS ANGELES, a Municipal Corporation; DARYL F. GATES, Chief of Police, and DOES 1 through 30, Inclusive, Respondents.	)	CIVIL NO. B064844 SUPERIOR COURT NO. BS005615

APPEAL FROM
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

HONORABLE RONALD M. SOHIGIAN,
JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

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2nd Civil No. B 064844

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA
DIVISION TWO

CRAIG FEINSTEIN,	)	CIVIL
	)	NO. B064844
Appellant,	)	SUPERIOR
	)	COURT
v.	)	NO. BS005615
	)	
CITY OF LOS ANGELES, a Municipal Corporation; DARYL F. GATES, Chief of Police, and DOES 1 through 30, Inclusive,	)	
	)	
Respondents.	)	

APPEAL FROM
THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

HONORABLE RONALD M. SOHIGIAN,
JUDGE PRESIDING

APPELLANT'S REPLY BRIEF

SUMMARY OF ARGUMENT.

The CITY is unable to cite this court to a single case where a post-severance evidentiary hearing was found unnecessary to meet constitutional due process requirements. The Holcomb case, since it did not involve a termination, is thus completely overshadowed by Doyle v. City of Chino (1981) 117 Cal.App.3d 673, in which the court held that the administrative appeal required by Government Code Section 3304(b) must be provided after the decision to terminate a public safety officer's employment. The Doyle decision is, in fact, dispositive of this appeal.

The CITY's argument that Civil Service employees are entitled to greater constitutional protection than public

safety officers is without merit. Once the legislature vests an employee with a property interest in his job, constitutional guarantees of due process apply equally, without regard to job classification.

Constitutional due process requires that "notice of the proposed action" be given at the pre-removal stage and that an opportunity for an evidentiary hearing be given at the post-removal stage. FEINSTEIN was thus deprived of his fundamental due process rights at both stages.

The Board's reliance upon an incorrect legal assumption in its recommendation that FEINSTEIN be removed is a flaw that cannot be dismissed with speculation that it would not have made a difference in the Board's decision.

FEINSTEIN has established a prima facie case of retaliation which the CITY is unable to overcome since there was no new evidence presented at the Board to support an increased penalty.

2.

CONSTITUTIONAL AND STATUTORY DUE PROCESS REQUIREMENTS WERE NOT MET.

Respondent's brief correctly points out that the issues are framed too narrowly in appellant's opening brief. However, the CITY's characterization of the issues is far too narrow as well.

A four-tiered approach to this case is required. FEINSTEIN contends that the CITY did not provide the due process required under its own charter; conversely, if those requirements were met, then the City Charter does not

comply with statutory and constitutional due process requirements. Likewise, FEINSTEIN contends that the statutory due process requirements set forth in Government Code Sections 3300, et seq. were not met; conversely, if they were met, they do not comply with constitutional due process requirements.

FEINSTEIN was deprived of due process at the pre-removal stage, during which he was never given "notice of the proposed action," and at the post-removal stage, at which point he was given no opportunity for an administrative appeal.

The respondent's brief candidly states, at pages 5-6, that the City Charter and "the Public Safety Officers' Procedural Bill of Rights Act" (i.e., Government Code Sections 3300-3311) fall short of providing constitutionally mandated due process to officers who are

disciplined. The applicable section of the City Charter was enacted in 1935, and the requirement of a pre-removal hearing (a so-called "Skelly hearing") was simply grafted onto the disciplinary procedures employed by the Los Angeles Police Department after publication of the Supreme Court's decision in Skelly v. State Personnel Board (1975) 15 Cal.3d 194, without amending the City Charter. Apparently, no such accommodations were made following enactment of the "Bill of Rights Act" a year after Skelly was decided.

A. CONSTITUTIONAL DUE PROCESS REQUIREMENTS DO NOT DISTINGUISH BETWEEN CIVIL SERVICE EMPLOYEES AND PUBLIC SAFETY OFFICERS.

Respondent's brief admits that neither the City Charter nor the Bill of

Rights Act "purports to provide or does provide the full panoply of constitutionally mandated processes to which California and federal courts have determined Civil Service employees are entitled." Nevertheless, even the State Civil Service Act, with its elaborate safeguards and procedures (see Government Code Sections 19570, et seq.), did not pass constitutional muster when reviewed by the Supreme Court in Skelly, supra:

> . . . we are convinced that the provisions of the California Act concerning the taking of punitive action against a permanent civil service employee do not fulfill minimum constitutional demands.
>
> It is clear the due process does not require the state to

provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. Skelly, Id. at 215.

The CITY's attempt to implement Skelly by grafting its requirements onto the procedural due process requirements imposed by the City Charter has evidently fallen short of the mark. At any rate, the attempt itself betrays the weakness of the CITY's argument that Civil Service employees somehow have more constitutional protection than public safety officers.

Civil Service employees do not enjoy greater constitutional protection than their public safety officer counterparts. Once the legislature grants an employee a "property interest" in his job, procedures for protecting that property interest must meet constitutional due process requirements, which do not change according to the employee's job classification. In Skelly, the state Supreme Court clearly adopted the view of

the majority of the United States Supreme Court Justices who decided Arnett v. Kennedy (1974) 416 U.S. 134, to wit:

> Where state procedures governing the taking of a property interest are at issue, all six justices were of the view that the existence of the interest is to be determined in the first place under applicable state law, but that the adequacy of the procedures is to be measured in the final analysis by applicable constitutional requirements of due process. [Citations.] 'While the legislature may elect not to confer a property interest in . . . [civil service] employment [fn. omitted], it may not

constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.' Skelly, Id. at 212. (Emphasis added.)

B. "NOTICE OF THE PROPOSED ACTION."

The respondent's brief states that FEINSTEIN's claim that he had no notice prior to the Board of Rights that the CITY was seeking his removal "is contrary to the facts." (Respondent's brief, page 7.) Not surprisingly, the CITY fails to provide a reference to any portion of the record on appeal where the "contrary facts" appear.

The CITY's argument, plainly stated, is that notice of "the possibility of removal" is equivalent to notice that the CITY is actually seeking removal.

The mind simply staggers at the notion. If one must exercise his right to appeal at a stage when the full array of punitive actions, or none at all, may be taken against him, one might fairly ask: "What is being appealed from?"

C. LACK OF FINALITY AND THE TIMING OF ADMINISTRATIVE APPEALS.

Respondent's brief cites White v. County of Sacramento (1982) 31 Cal.3d 676 as support for the proposition that an appeal may lie before punishment is fixed. The CITY's position in this instance is demonstrably wrong. In footnote 6 of the decision, the Supreme Court expressly disclaimed any intent to make such a ruling:

> It should be noted that the parties to this appeal have not raised the question of the

'timing' of the 'opportunity for administrative appeal' provided by section 3304, subdivision (b). Doyle v. City of Chino (1981) 117 Cal.App.3d 673, 678-680 [172 Cal.Rptr. 844] held that the right does not arise until a decision to take punitive action is made. That court rejected the notion that the right arises upon the taking of any action which might lead to punitive action . . . White, Id. at 684.

The Doyle decision is, in fact, dispositive of this issue. In Doyle, the court specifically addressed the issue of the timing of the appeal provided for in Government Code Section 3304(b):

Petitioner contends that since the statute is silent regarding

when the administrative appeal must take place, it must precede any punitive action. Doyle's interpretation would essentially amend the statute to read: 'No punitive action . . . shall be undertaken without first providing the public safety officer an opportunity for administrative appeal.' Chino argues that the language of section 3304 means simply that a peace officer is entitled to an administrative appeal in connection with any punitive job action undertaken.

Obviously, the wording of section 3304, subdivision (b) contributes to this ambiguity.

Neither interpretation is implausible on its face . . .

It is generally accepted that an administrative appeal provides for an independent re-examination of an order or decision made. [Citations.] Similarly, an administrative appeal may also be taken from notice of a decision or order prior to its actual date of implementation in certain situations. [Citation.] Obviously, a decision to terminate an officer's employment, whether implemented yet or not, constitutes punitive action. However, the Legislature has more broadly defined that term to encompass

'any action which may lead [to discipline].' Reasoning from this, Doyle contends he is entitled to an appeal even before any decision to discipline has been reached. We disagree.

In our view, Doyle's reading of section 3304 would neither assure meaningful review, nor enhance his rights appreciably. Prior to any decision by the police department or city to take disciplinary action, there exists no order or decision which can be challenged as arbitrary, erroneous, or unsupported by the evidence. At best, only the department's internal investigative

procedures could be challenged. Therefore, Doyle's request for an administrative appeal is premature. The best proof of this is the fact that even if Chino entertained Doyle's request, those administrative appeal proceedings would not be judicially reviewable by writ of mandate. This is necessarily so because such writs issue '. . . for the purpose of inquiring into the validity of any final administrative order or decision . . .' (Code Civ. Proc., §1094.5)

We are cognizant of the fact that the broad purpose of the bill is to promote stable

relations between public safety employers and employees (§3301). However, Doyle and other police officers similarly situated are hardly without rights prior to the point the department makes a decision whether or not to take disciplinary action . . .

We conclude that the opportunity for an administrative appeal set forth in section 3304, subdivision (b) should exist once any decision is taken to discipline an officer . . . In this instance, the city promptly informed Doyle of his right to an administrative appeal at the time a decision

was reached to terminate his employment. That action was proper and complied with what we determine to be a reasonable meaning of this admittedly ambiguous statute. Doyle, Id. at 679-680.

In a footnote to the above comments, the court stated that its holding with respect to Section 3304, Subdivision (b) "should in no way be interpreted as eliminating the general preremoval safeguards of notice and opportunity to be heard provided in Skelly." Doyle, Id. at fn. 5.

Respondent's brief states, at page 10: "Appellant participated in a Skelly meeting before the Department made a final decision to sustain the charge against him and impose a penalty therefor, and he had a full Board of

Rights hearing afterwards. That is all the process any court in the land has held he is due." The first sentence is simply untrue to the extent it implies a final decision was made as to FEINSTEIN's penalty before the Board of Rights hearing. The second sentence misinterprets both Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532, and Skelly, supra, the two leading cases in this subject area.

In Skelly, the California Supreme Court was dealing with the State Civil Service Act, which provides for an evidentiary hearing after an adverse action is imposed[1]:

---

[1] Under the State Civil Service Act, the evidentiary hearing is conducted by a board which is not empowered to increase the penalty previously imposed. Government Code Section 19583.

> As it is clear that California's statutory scheme does provide for an evidentiary hearing after the discipline is imposed [citations], we view the petitioner's constitutional attack as directed against that section which permits the punitive action to take effect without according the employee any prior procedural rights. Skelly, Id. at 205.

In Cleveland Board of Education v. Loudermill, the United States Supreme Court concluded that: "All the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute." Cleveland Board of Education, Id. at 547-548. The Ohio

statute likewise provides for a post-termination evidentiary hearing. Cleveland Board of Education, Id. at fn. 6.

Contrary to the CITY's assertion, the "courts in the land" seem to unanimously agree that the constitutional guarantee of due process requires that an employee with a property interest in his job who is discharged for cause be given the opportunity to have a post-severance evidentiary hearing. See, e.g., Coleman v. Department of Personnel Administration (1991) Cal.3d 1102, 1119, and the cases cited above.

3.

FLAWED RATIONALE FOR REMOVAL.

The CITY impliedly admits that the Board of Rights erred in its assumption

that the CITY would be vicariously liable for FEINSTEIN's negligence while driving to work. Instead, the CITY argues that the Board's fear of civil liability to the CITY was "insignificant, if not irrelevant" to the Board's decision-making process.

The record suggests otherwise. The Board's concern with the CITY's civil liability was a recurring theme in the chairman's closing remarks. (CT. 542-546)

More importantly, the CITY's argument constitutes pure speculation. The flaw in the Board's rationale for deciding upon removal, having been admitted, is not so easily trivialized. Officer FEINSTEIN's career and livelihood are at stake; under these circumstances, the court has no choice but to reverse and remand:

> The basis of the board's decision approving Shepherd's dismissal thus partially fails, and it is settled that, in such a situation, orderly procedure will be best be preserved by remanding the case to the administrative agency empowered to act in matters of discipline so that it may reconsider the penalty to be imposed. Shepherd v. State Personnel Board (1957) 48 Cal.2d 41, 51.

4.

RETALIATION IS SHOWN BY THE LACK OF NEW EVIDENCE.

The CITY dismisses the fact that FEINSTEIN's commanding officer recommended a 10-day suspension and the

Board recommended removal based upon the same evidence as "totally meaningless." (Respondent's brief at page 10.) The lack of "legitimate reasons," however, for the differing recommendations would seemingly overcome the presumption relied upon by the court in Holcomb that official duties have been regularly performed. Holcomb, Id. at 1568.

The CITY's lame attempt to argue that there was new evidence presented at FEINSTEIN's Board should also be rejected. The fact that the Board spent a great deal of time reviewing the evidence and that they had the opportunity to assess the credibility and demeanor of the witnesses, including FEINSTEIN, would be true of any Board. To suggest that the Board had better knowledge of FEINSTEIN's potential for

rehabilitation than his commanding officer is, of course, ludicrous.

Indeed, the fact that the Board mouthed the words that it had "a much better view of the entire situation and how it relates to you personally than reviewers of fact had prior to this hearing," a quote taken word-for-word from the Holcomb decision, smacks of pure cynicism. It is as if the Board thought that these words, of which the CITY's attorney is so proud[2], would have a magical effect on its listeners.

Using the CITY's own criteria for establishing covert retaliation, or that set forth in Holcomb, it is hard to imagine a more compelling case than FEINSTEIN's.

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[2] Having quoted them again at page 11 of Respondent's Brief.

5.

CONCLUSION.

FEINSTEIN was deprived of his fundamental due process rights by the CITY's failure to inform him that it was seeking his removal prior to the Board hearing and by its failure to provide an avenue of appeal following the decision to terminate him. The rights to "notice of the proposed action" and a post-severance evidentiary hearing are guaranteed by the Constitution because FEINSTEIN was granted a property interest in his job by the Los Angeles City Charter and the Bill of Rights Act.

"Notice of the proposed action" means something more than informing the employee of the full spectrum of punitive actions available. An employee cannot meaningfully exercise his right to an

appeal without knowing what he is appealing from.

The Doyle case correctly decides that the Bill of Rights Act requires a post-severance evidentiary hearing. Indeed, when the punitive action taken against the employee is a termination for cause, the courts have unanimously held that a post-severance evidentiary hearing is mandated by constitutional due process requirements.

The Board's preoccupation with the CITY's potential liability for any mishaps that might occur while FEINSTEIN was driving to work demonstrates that their decision to remove him was at least partially based upon a flawed legal assumption. To ignore this admitted flaw would unfairly diminish the property interest in their jobs granted to all

public safety officers by the Bill of Rights Act.

FEINSTEIN has overcome the presumption that official duties are regularly performed, relied upon in Holcomb, by demonstrating the lack of new or qualitatively different evidence to justify the increase in his penalty from a 10-day suspension to a removal. By merely remanding this case for further Board proceedings, this court would invite further retaliation against FEINSTEIN.

As such, FEINSTEIN must be reinstated in his position and restored to status quo as it existed prior to his Board of Rights hearing. At a minimum, he must be given the opportunity to present evidence at another hearing concerning the penalty imposed upon him by the prior Board, together with an

award of back pay retroactive to the date of his termination and an award of reasonable attorney's fees pursuant to Code of Civil Procedure Section 1021.5.

Respectfully submitted,

Dated: July 30, 1992

HOLLINS, SCHECHTER & FEINSTEIN

By: _____
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Attorneys for Appellant,
CRAIG FEINSTEIN

APPENDIX H

BILL OF RIGHTS

§ 3300. Short title

This chapter is known and may be cited as the Public Safety Officers Procedural Bill of Rights Act.

§ 3301. Definition; Legislative finding and declaration

For purposes of this chapter, the term public safety officer means all peace officers, as defined in Section 830.1 and subdivisions (a) and (b) of Section 830.2 of the Penal Code, including peace officers who are employees of a charter city or county. The term public safety officer also means all persons employed by the State of California and designated by law as peace officers.

The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that such stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

§ 3302. Political activity

(a) Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity.

(b) No public safety officer shall be prohibited from seeking election to, or serving as a member of, the governing board of a school district.

§ 3303. Subjection to interrogation; Temporary reassignment

When any public safety officer is under investigation and subjected to interrogation by his commanding officer, or any other member of the employing public safety department, which could lead to punitive action, such interrogation shall be conducted under

the following conditions. For the purpose of this chapter, punitive action is defined as any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.

(a) The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If such interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for such off-duty time in accordance with regular department procedures, and the public safety officer

shall not be released from employment for any work missed.

(b) The public safety officer under investigation shall be informed prior to such interrogation of the rank, name and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.

(c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(d) The interrogating session shall be for a reasonable period taking into consideration gravity and complexity of the issue being investigated. The person under interrogation shall be allowed to attend to his own personal physical necessities.

(e) The public safety officer under interrogation shall not be subjected to offensive language or threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogation shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action. No promise of reward shall be made as an inducement to answering any question. The employer shall not cause the public safety officer under

interrogation to be subjected to visits by the press or news media without his express consent nor shall his home address or photograph be given to the press or news media without his express consent.

(f) The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be

confidential. No notes or reports which are deemed to be confidential may be entered into the officer's personnel file. The public safety officer being interrogated shall have the right to bring his own recording device and record any and all aspects of the interrogation.

(g) If prior to or during the interrogation of a public safety officer it is deemed that he may be charged with a criminal offense, he shall be immediately informed of his constitutional rights.

(h) Upon the filing of a formal written statement of charges, or whenever an interrogation focuses on matters which are likely to result in punitive action against any public safety officer, that officer, at his request, shall have the

right to be represented by a representative of his choice who may be present at all times during such interrogation. The representative shall not be a person subject to the same investigation. The representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters.

This section shall not apply to any interrogation of a public safety officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer, nor shall this section apply to an investigation concerned solely and

directly with alleged criminal activities.

(i) No public safety officer shall be loaned or temporarily assigned to a location or duty assignment if a sworn member of his department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances.

§ 3304. Protection of procedural rights

(a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order the agency may officially charge him with insubordination.

(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.

§ 3305. Entry of adverse comments in personnel file

No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file

used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer.

§ 3306. Response to adverse comment

A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment.

§ 3307. Polygraph examination.

No public safety officer shall be compelled to submit to a polygraph examination against his will. No disciplinary action or other recrimination shall be taken against a public safety officer refusing to submit to a polygraph examination, nor shall any comment be entered anywhere in the investigator's notes or anywhere else that the public safety officer refused to take a polygraph examination, nor shall any testimony or evidence be admissible at a subsequent hearing, trial, or proceeding, judicial or administrative, to the effect that the public safety officer refused to take a polygraph examination.

§ 3308. Disclosure of financial status

No public safety officer shall be required or requested for purposes of job assignment or other personnel action to disclose any item of his property, income, assets, source of income, debts or personal or domestic expenditures (including those of any member of his family or household) unless such information is obtained or required under state law or proper legal procedure, tends to indicate a conflict of interest with respect to the performance of his official duties, or is necessary for the employing agency to ascertain the desirability of assigning the public safety officer to a specialized unit in which there is a possibility that bribes or other improper inducements may be offered.

§ 3309. Search of locker

No public safety officer shall have his locker, or other space for storage that may be assigned to him searched except in his presence, or with his consent, or unless a valid search warrant has been obtained or where he has been notified that a search will be conducted. This section shall apply only to lockers or other space for storage that are owned or leased by the employing agency.

§ 3309.5. Proceeding for violation of rights and protections

(a) It shall be unlawful for any public safety department to deny or refuse to any public safety officer the rights and protections guaranteed to them by this chapter.

(b) The superior court shall have initial jurisdiction over any proceedings brought by any public safety officer against any public safety department for alleged violations of this section.

(c) In any case where the superior court finds that a public safety department has violated any of the provisions of this chapter, the court shall render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order, preliminary, or permanent injunction prohibiting the public safety department from taking any punitive action against the public safety officer.

§ 3310. Exception as to public agencies providing protections of rights

Any public agency which has adopted, through action of its governing body or its official designee, any procedure which at a minimum provides to peace officers the same rights or protections as provided pursuant to this chapter shall not be subject to this chapter with regard to such a procedure.

§ 3311. Mutual aid agreements

Nothing in this chapter shall in any way be construed to limit the use of any public safety agency or any public safety officer in the fulfilling of mutual aid agreements with other jurisdictions or agencies, nor shall this chapter be construed in any way to limit any jurisdictional or interagency cooperation under any circumstances where such

activity is deemed necessary or desirable by the jurisdictions or the agencies involved.

APPENDIX I

CHARTER, CITY OF LOS ANGELES
ARTICLE XIX, SECTION 202(2)

APPENDIX I

CHARTER, CITY OF LOS ANGELES
ARTICLE XIX, SECTION 202(2)

CHARTER, CITY OF LOS ANGELES

ARTICLE XIX, SECTION 202(2)

(1) The right of an officer or employee of the Police Department to hold his office or position and to the compensation attached to such office or position is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided. No officer or employee of the Police Department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the Police Department (other than by resignation), except for good and sufficient cause shown upon a finding of "guilty" of the specific charge or charges assigned as cause or causes therefor after a full,

fair and impartial hearing before the Board of Rights (except as otherwise specifically provided in paragraphs two [2] and seven [7] of this section). Such charges must be based upon some act committed or omitted by such officer or employee within one (1) year prior to the filing of the complaint referred to herein. No case of suspension with loss of pay shall be for a period exceeding six (6) months.

(2) Provided, however, that the Chief of Police may:

(a) Temporarily relieve from duty any officer or employee of the Police Department pending a hearing before and decision by the Board of Rights of any charge or charges pending against such officer or employee; or he may

(b) Suspend such officer or employee for a total period not to exceed thirty (30) days with loss of pay and with or without reprimand, subject, however, to the right of such officer or employee to a hearing before a Board of Rights. In the event the officer or employee suspended under this subparagraph files his application with the Chief of Police (within five [5] days after service upon him of notice of such suspension if he has been personally served or within ten [10] days if he has been served in any other manner as herein prescribed), for a hearing before and decision by a Board of Rights in the manner in this section provided, such suspension shall thereupon automatically become a temporary relief from duty pending hearing and decision by the Board of Rights. In the event, however, that such officer or employee so

suspended under subparagraph (b) of paragraph (2) hereof, fails to so apply for such hearing within the period prescribed, he shall be deemed to have waived such hearing and such suspension shall remain effective, unless the Chief of Police requires that a hearing be had, as hereinafter provided.

(3) In the event any order of relief from duty or order of suspension is made under either subparagraphs (a) or (b) of paragraph two (2), such order must contain a statement of the charges assigned as causes therefor, and the Chief of Police must (within five [5] days after such order of relief from duty or order of suspension is served as in this section prescribed) file with the Board of Police Commissioners a copy of a verified written complaint upon which

such order of relief from duty or order of suspension is based, with a statement that a copy of such order of relief from duty or order of suspension and a copy of verified complaint was served upon the accused. Such complaint must be verified by the oath of the person making the same and must contain a statement in clear and concise language of all the facts constituting the charge made. In the event that the Chief of Police fails to file the aforesaid statement and complaint within the five (5) day period heretofore prescribed, the aforesaid order of temporary relief from duty or order of suspension shall thereupon become void and of no effect and shall be automatically revoked, and the accused officer or employee restored to duty with the department without loss of pay and without prejudice, the same as if no

order of relief from duty or order of suspension had been made.

(4) The service of any notice, order or process mentioned in this section, other than service of subpoena, may be made either by handing the officer or employee a copy thereof personally or by forwarding such copy by registered mail to his last known address of record with the Police Department if after due diligence he cannot be found.

(5) Within five (5) days after service upon him of copy of the aforesaid verified complaint if he has been personally served or within ten (10) days after service upon him of copy of the aforesaid verified complaint if he has been served in any other manner as herein prescribed, the accused officer or

employee may file with the Chief of Police his written application for a hearing before and decision by a Board of Rights.

(6) The Board of Rights shall be constituted of three (3) officers of the rank of Captain or higher. Upon the filing of the request for hearing before a Board of Rights as hereinabove provided, the officer or employee shall draw six (6) cards from a box containing the names of all of the officers who are qualified to sit upon such board (except the names of the accused, the accuser, the Chief of Police and the Assistant Chief of Police, and such other officer as may be otherwise prejudiced or otherwise disqualified by reason of being a material witness to the facts constituting the charges made), and shall

select any three (3) of the six (6) names thus drawn to constitute the Board of Rights to hear and decide upon the charges against him, rejecting the three (3) not selected by replacing them in the box. The three (3) thus selected shall constitute the Board of Rights to hear and decide the matter.

(7) In the event the accused fails, in any case, to request a hearing before a Board of Rights as hereinabove provided within the period prescribed, the Chief of Police may require a hearing to be had before a Board of Rights and may for that purpose, within five (5) days, after the expiration of such period, draw three (3) names from such box to constitute such board. Provided, however, that in any case where such Board of Rights has been constituted for the purpose of hearing as

herein in this section provided and the accused, without reasonable excuse, fails or neglects or refuses to appear before the said Board of Rights in session for such trial or hearing at the time and place designated, the Chief of Police may, at his discretion, either direct the Board of Rights to proceed with such trial or hearing in the absence of such accused, or he may, without such hearing, impose such penalty of suspension or removal as he deems fit and proper, and cause notice thereof to be served upon such officer or employee so suspended or removed in the manner herein prescribed, and file a statement of such action with the Board of Police Commissioners within five (5) days thereafter; and provided further, however, that in the event the accused and Chief of Police both fail to draw and create such Board of Rights

within the period prescribed in any case of temporary relief from duty pending hearing, then and in that event such temporary relief from duty shall be null and void and of no effect, the same as if it had not been made.

(8) Upon the selection of the officers to constitute the Board of Rights, the said Chief of Police shall appoint the time (not less than five [5] nor more than ten [10] days thereafter) and designate a place where such hearing is to be held, and shall cause notice thereof to be served upon accused in the manner herein prescribed.

The Board of Rights may at any stage of the proceedings (after it has first met in session at the time and place designated) continue from time to time

the hearing of the matter pending before them.

(9) The officers so selected as herein prescribed shall constitute the Board of Rights (for the purpose of hearing and deciding upon the matter for which it was specially drawn) and shall have the power to administer oaths and affirmations in any investigation or proceeding pending before said board, examine witnesses under oath, and compel the attendance of witnesses and the production of evidence before them, respectively, as the case may be, by subpoena to be issued in the name of the City of Los Angeles, and to be attested by the City Clerk of said city.

(10) The City Clerk shall, upon demand of the officers constituting the said

Board of Rights, issue such subpoena in the name of the city, and attest the same with the corporate seal thereof, and shall in such subpoena direct and require the attendance of the witnesses sought to be subpoenaed before the said board, at the time and place in said subpoena specified; and it shall be the duty of the Chief of Police to cause all such subpoenas to be served by some member of the Police Department upon the person or persons required to attend as aforesaid; and it shall be the duty of the Council upon the adoption of this charter amendment to provide suitable penalties for disobedience of such subpoenas, and the refusal of witnesses to testify as herein provided.

(11) The City Attorney (or some duly authorized deputy) shall, upon request of

the Board of Rights, sit with said Board of Rights during its session or hearing for the purpose of advising the said board on any and all legal matters pertaining to this section.

(12) At such hearing the accused shall have the right to appear in person and by counsel or representative, or both, and make defense to such charge and may produce witnesses to testify in his behalf and cross-examine witnesses against him. The accused shall have the right and privilege to select and name any officer of the department of any rank not higher than the rank of Lieutenant (who is not otherwise disqualified by reason of prejudice or being a party to the action in any capacity) to act as his defense representative at such hearing. The Chief of Police must immediately

assign the officer so selected and named to act as such representative, and it is hereby made the duty of such officer to use every legal means available and exercise the best efforts of which he is capable to defend the accused at such hearing. All testimony at such hearing shall be given under oath, reported by a stenographer and transcribed and the accused shall be entitled to a certified copy of such transcript without charge or payment of fee. The said Board of Rights shall, at the conclusion of the hearing, make its specific findings of "guilty" or "not guilty" (on each specific charge) which must be based upon the evidence adduced before it at such hearing and not otherwise and render and certify its decision in writing. If the accused is found "not guilty," said board shall order his restoration to duty without

loss of pay and without prejudice, and such order shall be self-executing and immediately effective. In case, however, that the accused is found "guilty," the said Board of Rights shall prescribe its penalty (by order in writing) of either suspension for a definite period not exceeding six (6) months with total loss of pay, and with or without reprimand; or reprimand without further penalty; or of removal from office or position; which decision and order must be certified in writing and a copy thereof immediately delivered to the Chief of Police. The departmental personal history and records of the accused shall not be available to the Board of Rights except and only in such cases where the accused has been found guilty of any charge upon which he was heard or tried by the Board of Rights, then only for the purpose of

determining a property penalty to be prescribed; provided, however, that in prescribing such penalty the said board must look to the nature and gravity of the offense of which the accused has been found guilty and may at its discretion review the departmental personal history and record of such accused; provided further, however, that no item or entry in such record may be considered by the said board except in the presence of the accused, nor unless such accused has been given a fair and reasonable opportunity to explain any such item or entry.

(13) The Chief of Police shall thereafter execute the order of the Board of Rights within five (5) days after delivery to him of such certified copy of the decision and order, or, he may within five (5) days at his discretion and in

lieu of such order, impose a penalty upon such officer or employee less in severity than that ordered by the Board of Rights, but may not impose a greater penalty. In the case of a suspension or removal, the Chief of Police shall cause a copy of his notice of suspension or removal (based upon the order of the Board of Rights or upon his modification thereof) to be served upon such officer or employee and shall file a statement of such action with the Board of Police Commissioners within five (5) days thereafter.

(14) in any case of penal suspension or removal prescribed by the Board of Rights (or by the Chief of Police in case no hearing is had before a Board of Rights) the time of such suspension shall be computed from the first day such officer or employee was so suspended or relieved

from duty pending hearing before and a decision by the Board of Rights, and such removal shall relate back to and be effective as of the date of such relief from duty pending hearing before and decision by the Board of Rights.

(15) No officer or employee of the Police Department shall be twice tried for the same offense, except upon his request. In any case of exoneration of the accused after a hearing before the Board of Rights, such exoneration shall be without prejudice to such officer or employee.

(16) At any time within three (3) years after any case of removal as hereinabove provided, the officer or employee so removed may file his request with the Chief of Police to be reheard or to be

heard on the cause of his removal, together with his supporting affidavit specifically setting forth in clear and concise language the reasons or grounds therefor. The Chief of Police must consider and decide upon such request and affidavit within thirty (30) days after such filing. If good reason or cause appears therefor, the Chief of Police must, without unnecessary delay, cause a Board of Rights to be constituted in the manner hereinabove provided for the purpose of hearing and deciding upon the matter. The said Board of Rights shall proceed as hereinabove prescribed, and shall at the conclusion of the hearing render and certify its findings (independent of any previous findings by any other Board of Rights, or any other court, board or other tribunal, or any investigation or report of or discretion

exercised by the Chief of Police in such cases where no hearing was had before a Board of Rights), based upon the evidence adduced before it at such hearing and not otherwise, and shall make and certify its decision and order in writing, and shall deliver a copy thereof to the Chief of Police. The Chief of Police shall thereupon proceed in the same manner as is hereinabove provided for after decision by the Board of Rights.

(17) If, as and when the Board of Police Commissioners herein referred to should be abolished, then, and in that event, whenever in this section the Board of Police Commissioners is named or referred to there shall be read into this section in place thereof, the name of the officer, board, or other body created in its place to assume the functions, powers

and duties of such Board of Police Commissioners; or, in the absence of such specific provision, then there shall be read into this section the name of the officer, board or body to whom such powers or duties may be delegated, or who shall assume such powers or duties.

(18) This section shall not be construed to in any way affect any other rights any officer or employee may have to pursue or assert any and all other legal rights or remedies in relation to his office or position or to the compensations attached thereto, or to appeal to or be heard or tried by or before any court or other tribunal of competent jurisdiction, whether such court or other tribunal now exists or may be hereafter created or established.

(19) Any person restored to duty or reinstated in his office or position after suspension or removal, as provided in and under any provision of this section, shall be entitled to receive full compensation from the city the same as if such suspension or removal had not been made, provided that such compensation shall not be for more than six (6) months salary. (Amendment 1935).

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No. 92-1531

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CRAIG FEINSTEIN,

Petitioner,

vs.

CITY OF LOS ANGELES, et al.,

Respondents.

Petition for Writ of Certiorari
to the California Court of Appeal
Second Appellate District, Division Two

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution requires that a public employee with a vested property interest in his employment be provided a post-deprivation appeal when he has been afforded a full administrative trial prior to his removal from employment?

2. Whether it is consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution for a city administrative tribunal vested by the city's Charter with authority to suspend or remove a police officer, to recommend to the Chief of Police the removal of an officer after notice to him of a disciplinary charge and a full evidentiary trial on that charge, where,

before the trial, the Chief of Police had proposed that the officer be suspended?

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BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

In Craig Feinstein v. City of Los Angeles, et al., the California Court of

Appeal upheld the judgment of a Superior Court of Los Angeles County denying a petition for writ of administrative mandate sought by petitioner under California Code of Civil Procedure § 1094.5. The petition requested that a writ be issued ordering the Chief of Police of the Los Angeles Police Department to set aside the termination of petitioner's employment as a police officer on the basis that petitioner had been denied due process. The decision to remove petitioner had been made by the Chief of Police upon the recommendation of a Police Department administrative tribunal (the "Board of Rights") after a full evidentiary trial on a charge of which petitioner had notice and against which he defended.

The tribunal, convened at the request of petitioner, acted pursuant to

the authority vested in it by § 202 of the Charter of the City of Los Angeles.[1]

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[1]Section 202 provides a very detailed procedure for the discipline and removal of police officers, from a provision for notice to the affected officer to a provision for rehearing. The subsections of § 202 pertinent to this petition follow:

> Section 202:
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> "(1) . . . No officer or employee of the Police Department shall be suspended, removed, deprived of his office or position, or otherwise separated from the service of the Police Department (other than by resignation), except for good and sufficient cause shown upon a finding of "guilty" of the specific charge or charges assigned as cause or causes therefor after a full, fair and impartial hearing before the Board of Rights . . . .
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> (2) Provided, however, that the Chief of Police may:
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> . . .
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> (b) Suspend such officer or employee for a total period not to exceed

(continued...)

[1](...continued)
thirty (30) days with loss of pay and with or without reprimand, subject, however, to the right of such officer or employee to a hearing before a Board of Rights.

. . .

(12) . . . The said Board of Rights shall, at the conclusion of the hearing, make its specific findings of "guilty" or "not guilty" (on each specific charge) which must be based upon the evidence adduced before it at such hearing and not otherwise and render and certify its decision in writing. . . . In case, however, that the accused is found "guilty," the said Board of Rights shall prescribe its penalty (by order in writing) of either suspension for a definite period not exceeding six (6) months with total loss of pay, and with or without reprimand; or reprimand without further penalty; or of removal from office or position; which decision and order must be certified in writing and a copy thereof immediately delivered to the Chief of Police. . . .

(continued...)

Prior to the trial, petitioner had been served with a specific charge of misconduct, had been provided the investigative materials on which the charge was based and had been given an opportunity, of which he availed himself, to be heard on the charge at a meeting with his captain, a delegate of

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[1](...continued)

> (13) The Chief of Police shall thereafter execute the order of the Board of Rights within five (5) days after delivery to him of such certified copy of decision and order or, he may within five (5) days at his discretion and in lieu of such order, impose a penalty upon such officer or employee less in severity than that ordered by the Board of Rights, but may not impose a greater penalty. . . ."

See petitioner's Appendix I for the full text of Charter § 202.

the Chief of Police.[2] After the meeting, the captain recommended petitioner be suspended for ten days. The Chief of Police accepted the recommendation and notified petitioner that he was to receive a ten day suspension without pay. The suspension was never served however, because before the date set for its imposition, petitioner exercised his right under § 202(2)(b) to request a full hearing by a police department Board of Rights on the charge against him.

The Board held a two day evidentiary hearing at which petitioner was represented by a defense representative of his choice. He

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[2]These and the facts which follow are contained in the decision of the Court of Appeal, petitioner's Appendix A.

produced a witness on his behalf and cross-examined witnesses against him on the issue of his guilt or innocence of the charge. He did not produce any witnesses to speak on his behalf during the penalty phase of the hearing after his guilt had been determined.[3] At the conclusion of the hearing, pursuant to its authority under § 202(12), the three member Board announced that it was recommending to the Chief of Police that petitioner be removed from his position as a police officer. The recommendation was adopted by the Chief of Police and

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[3]The opinion of the Court of Appeal seems to suggest that petitioner refused to produce any witnesses at any time during the hearing. Since one of petitioner's issues on appeal was his alleged lack of notice of the potential increase in penalty, his focus, and that of the opinion of the court, was only his failure to produce character witnesses during the penalty phase of the hearing.

petitioner was subsequently terminated from his employment. Petitioner challenged the process by which he was removed as constitutionally defective, asserting that the Board of Rights increased his disciplinary penalty without providing him with either notice of that potentiality or a subsequent hearing. He is now challenging the Court of Appeal decision which upheld both the process and his removal.

In his petition to this Court, petitioner characterizes his Board of Rights hearing as an appeal from the initial decision of the Chief of Police to suspend him for ten days and challenges the Board's authority to recommend his removal. In fact, the hearing was a de novo trial at which the Board members adduced testimonial and documentary evidence that had not been

before the Chief of Police when he made his first penalty decision and at which no reference was made to the investigatory evidence that had been before the Chief of Police at that time. Thus, petitioner mischaracterizes his Board of Rights trial as an appeal from a property interest deprivation, when, in reality, it was a hearing prior to a property interest deprivation.

This mischaracterization is crucial to petitioner's challenge to the decision of the Court of Appeal. When the Board of Rights trial is properly recast as a pre-deprivation hearing, it is apparent that the Court of Appeal decision is wholly consistent with this Court's body of authority on pre-deprivation due process. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487

(1985); Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976); Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed 865, 70 S.Ct. 652 (1950). For that reason, review by this Court is not warranted and certiorari should be denied.

II.

ARGUMENTS FOR DENYING THE PETITION

A. Petitioner Received All The Process He Was Due.

Prior to being terminated from his employment, petitioner was notified of the disciplinary charge against him, was provided a copy of the investigative materials on which the charge was based,

and availed himself of the opportunity to be heard by a delegate of the Chief of Police. Skelly v. State Personnel Board, 15 Cal.3d 194, 539 P.2d 774, 124 Cal.Rptr. 14 (1975). As a result of that process, the Chief of Police decided to suspend petitioner for ten days. Petitioner, however, chose to exercise an option given to police officers under the Charter of the City of Los Angeles - to reject the discipline meted out by the Chief and to take his chance at a better result from a department Board of Rights.

Thereafter, a Board convened and conducted a two day evidentiary hearing at which petitioner was represented, produced and cross-examined witnesses, and introduced and challenged documentary evidence. At the conclusion of the hearing, based on what it had

seen and heard, the Board of Rights recommended that petitioner be removed. The Chief of Police acted on the Board's recommendation and petitioner was terminated from his employment. Petitioner is now before this Court because he took his chance with a Board of Rights, and lost.

Due process requires that a deprivation of life, liberty or property "be preceded by notice and an opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., supra, at 313. The essence of due process is the opportunity to be heard before a property deprivation, but the extent of the pre-deprivation hearing is determined by the importance of the interests involved and the nature of the subsequent proceedings. Boddie v.

Connecticut, supra. The interests involved in the deprivation of a public employee's employment are the private interest of the employee in retaining employment, the government employer's interest "in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." Mathews v. Eldridge, supra, at 335.

When it enacted Charter § 202, the City of Los Angeles chose to balance the competing interests of a public employer and its employees in favor of its employees, providing police officers with a full hearing before they are permanently deprived of any property interest in their employment.[4] In his

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[4]A provision of § 202 permits, under certain circumstances, the temporary relief from duty of an officer (continued...)

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first claim of constitutional deficiency petitioner asserts that notwithstanding the nature and extent of his pre-deprivation hearing, due process entitles him to a post-deprivation hearing as well. In support of his position, he cites Cleveland Board of Education v. Loudermill, supra.

In Loudermill, this Court established the extent of pre-deprivation process a public employer must give an employee who has a property interest in employment, holding that notice and an opportunity to be heard is sufficient so long as a post-deprivation hearing is held within a reasonable time

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[4](...continued)
pending a Board of Rights hearing. Petitioner, however, was not deprived of any salary or other property interest in his employment prior to his Board of Rights hearing.

thereafter. The extent of pre-deprivation process an employer may give an employee was not an issue in Loudermill or in any other case of which respondents are aware since it is the lack of pre-deprivation process and not its provision that creates a constitutional hazard. Boddie v. Connecticut, supra. Due process requires a hearing "at a meaningful time in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965). Petitioner exercised his right to be heard, in full, before a final decision was made to terminate his employment. That is all the process this Court has ever held is due. Since the Court of Appeal decision petitioner is challenging is entirely consistent with Loudermill and the long line of cases which comprise

this Court's body of law on pre-deprivation due process, review is not merited and certiorari should be denied.

B. Petitioner Had Adequate Notice Of The Potential For Removal.

If the essence of due process is the opportunity to be heard before being deprived of a property interest, the key to a constitutionally sufficient hearing is adequate notice. Mullane v. Central Hanover Bank & Trust Co., supra. Petitioner's second claim of constitutional deficiency is that the failure of the Board of Rights to fix his penalty before his hearing created a fatal lack of notice of the potential for removal.

Section 202(12) empowers a Board of Rights, upon a finding of guilt of any

charge against an officer, to "prescribe its penalty . . . of either suspension for a definite period not exceeding six (6) months with total loss of pay, and with or without reprimand; or reprimand without further penalty; or of removal from office or position . . . ." (Emphasis added.) The specific enumeration of penalty options in § 202(12) is contrasted with the language in the Civil Service Ordinance in Paoli v. Civil Service Commission of Mendocino County, 12 Cal.App.4th 1073, 15 Cal.Rptr.2d 874 (1993) which permitted the Mendocino County Civil Service Commission to "modify" a previously imposed disciplinary order. The California Court of Appeal, in a two to one decision, found that "modification" did not encompass changing the nature of

the punishment from suspension to discharge.

Petitioner cites Paoli at length in support of his contention that it offends the Constitution for an employer to impose a termination on an employee's appeal from a lesser penalty. Petitioner's reliance on Paoli is inapt. First, the Paoli court indicated that the Constitution would not have been offended had the Mendocino Civil Service Commission imposed a termination on Mr. Paoli's appeal from his suspension had Mr. Paoli been adequately notified of that possibility. Second, petitioner's Board of Rights hearing, unlike Mr. Paoli's hearing, was not an appeal from a lesser penalty, but a de novo pre-deprivation hearing. (See discussion, supra.) And third, petitioner, unlike Mr. Paoli, had adequate notice of the

authority of the Board of Rights to remove him.[5]

The Court of Appeal decision which upholds the process by which petitioner was terminated does not raise any issue of constitutional dimension for this Court's consideration. Respondents

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[5]Additionally, if, in fact, two districts of the California Court of Appeal have issued conflicting decisions regarding public employees' due process rights, the California Supreme Court should render its decision on the issue before this Court considers the necessity of granting review.

respectfully request that the petition for certiorari be denied.

Dated: April 13, 1993

Respectfully submitted,

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